

No. 11347

---

United States

N. 2447

Circuit Court of Appeals

For the Ninth Circuit.

---

LERNER STORES CORPORATION,  
a Corporation,

Appellant,

vs.

WILFRED A. LERNER,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED

AUG 8 - 1946

PAUL P. O'BRIEN,

CLERK



No. 11347

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

LERNER STORES CORPORATION,  
a Corporation,

Appellant,  
vs.

WILFRED A. LERNER,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer .....	17
Appeal:	
Certificate of Clerk to Transcript of Record on .....	42
Designation of Contents of Record on (DC) .....	41
Notice of .....	40
Statement of Points on which Appellant Intends to Rely and Designation .....	351
Certificate of Clerk to Transcript of Record on Appeal .....	42
Complaint .....	2
Designation of Contents of Record on Appeal (DC) .....	41
Findings of Fact and Conclusions of Law.....	29
Judgment .....	37
Names and Addresses of Attorneys.....	1
Notice of Appeal to Circuit Court of Appeals .....	40
Notice of Motion of Plaintiff for a New Trial..	39
Order Denying Motions for a New Trial and to Amend Findings .....	40

	INDEX	PAGE
Statement of Points on Which Appellant Intends to Rely on Appeal and Designation of Parts of Record Necessary for Consideration Thereof .....	351	
Stipulation .....	355	
Supplemental Transcript of Record.....	283	
Clerk's Certificate to Reporter's Transcript	350	
Reporter's Transcript on Objections to Findings .....	285	
Reporter's Transcript of Motion for New Trial .....	328	
Transcript of Record .....	44	
Exhibits for Defendant:		
A—Admitted in evidence .....	177	
B—Admitted in evidence.....	178	
C—Admitted in evidence .....	282	
Exhibits for Plaintiff:		
1—Admitted in evidence .....	89	
2—Admitted in evidence .....	90	
3, 4, 5, 6—Admitted in evidence.....	91	
7—Admitted in evidence .....	152	
8—Report of Mrs. Betty Reynolds.....	225	
9, 10—Admitted in evidence.....	231	
11—Photostat of Sales Tag.....	234	

INDEX	PAGE
Exhibits for Plaintiff—(Continued)	
12—Photostat of Bag .....	238
13—Photostat of Sticker .....	242
14—Admitted in evidence .....	244
15—Admitted in evidence .....	245
16A to 16E—Admitted in evidence.....	245
17—Admitted in evidence .....	245
18—Photostat of Tear Sheet .....	248
Witness for Defendant:	
Lerner, Wilfred	
—direct .....	267
—cross .....	275
—redirect .....	276
Witnesses for Plaintiff:	
Davis, Mrs. Ann	
—direct .....	221
Lerner, Wilfred	
—direct .....	229
—cross .....	261
—redirect .....	262
Magee, Graham	
—direct .....	62
—cross .....	108
—redirect .....	145, 161, 182
—recross .....	152, 163

## INDEX

## PAGE

## Witnesses for Plaintiff—(Continued)

Reynolds, Mrs. Betty	
—direct .....	224
Shelton, Jessie	
—direct .....	212
—cross .....	217
—redirect .....	220
Silverman, Milton	
—direct .....	183
—cross .....	196
—redirect .....	210

NAMES AND ADDRESSES OF ATTORNEYS:

JESSE H. STEINHART,

111 Sutter Street,

San Francisco, California.

Attorney for Plaintiff and Appellant.

MARCEL E. CERF,

ROBINSON & LELAND,

1060 Mills Tower,

San Francisco, California.

Attorneys for Defendant and Appellee.

In the District Court of the United States, Northern District of California, Southern Division.

No. 23662-G

**LERNER STORES CORPORATION**, a corporation,

Plaintiff,

vs.

**WILFRED A. LERNER,**

Defendant.

### COMPLAINT

1. Plaintiff, Lerner Stores Corporation, is a corporation incorporated under the laws of the State of Maryland. Defendant, Wilfred A. Lerner, is a citizen of the state of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. Plaintiff and predecessor concerns whose assets and goodwill plaintiff has acquired, have for over 28 years last past been continuously engaged in the sale at retail of low-priced women's wearing apparel through a group of stores located in [1\*] the populous cities throughout the United States. Plaintiff has specialized in supplying the needs of these members of the purchasing public who desire low-priced women's dresses, slacks, skirts, waists, blouses, hosiery, and other accessories of women's wearing apparel. As of January 31, 1944,

---

\* Page numbering appearing at foot of page of original certified Transcript of Record.

plaintiff conducted 180 retail stores in 42 states, including stores located in the States of California, Oregon, Washington, Nevada and Arizona. Plaintiff's business and all of its stores are known, designated and referred to by the purchasing public as "Lerner's" and "Lerner Shops," and are associated in the minds of the purchasing public with wearing apparel of the very latest styles and good fashion, at very reasonable prices.

3. Plaintiff first began business in the State of California in 1930, and as of January 31, 1944, plaintiff conducted and now conducts 13 stores in the State of California. Two of plaintiff's stores in California are located in San Francisco, one in Oakland, and plaintiff's other stores in California are located in Stockton, Santa Barbara, Pasadena, Bakersfield, San Diego, San Bernardino, Huntington Park, Inglewood and Long Beach. Plaintiff's stores in San Francisco and Oakland include among their customers residents of the City of San Jose and other Santa Clara and San Mateo County communities. Furthermore, on January 31, 1941, plaintiff leased certain premises in San Jose, California, designated as 152 South First Street, for the purpose of conducting therein one of plaintiff's retail stores. On the date of said lease said premises were occupied by other persons under leases which were to expire by July 1, 1942. Plaintiff planned that upon the expiration of such tenancies on July 1, 1942, plaintiff would occupy and conduct one of its retail stores in said premises. In and by said lease of January 31, 1941, plaintiff obligated

itself to rent said premises for the term commencing July 1, 1942, and ending [2] May 31, 1963, and to pay as rental the sum of \$900.00 per month from July 1, 1942, to May 31, 1943, and the sum of \$1,000.00 per month commencing June 1, 1943, and for the remainder of the term of said lease. Prior to July 1, 1942, however, war intervened, and wartime governmental restrictions upon construction work were enacted, and due to such governmental restrictions during the war emergency period, plaintiff's plans for improvement and occupancy by plaintiff of said San Jose premises are being held in abeyance pending the lifting of said restrictions. Plaintiff's lease upon said San Jose premises has continued and is in full force and effect. Plaintiff has temporarily sub-leased said premises at the rental of \$800.00 per month until said construction restrictions are lifted, and plaintiff continues to pay to its lessor said rental of \$1,000.00 per month as required of plaintiff under its lease of January 31, 1941.

4. Plaintiff's business has been increased and developed by means of the expenditure of great effort, sound business policy, and the investment by plaintiff's stockholders of their funds, together with the continuous presentation to the purchasing public of the names "Lerner" and "Lerner Shops." By means of such expenditures, investments and presentation of said names, plaintiff has established a large, continuous and profitable volume of sales through the medium of its retail stores associated in the minds of the purchasing public with the names

"Lerner" and "Lerner Shops." Such sales for the fiscal year ended January 31, 1944, were in excess of \$75,000,000.00, and plaintiff's net profits from such sales were in excess of \$2,000,000.00. Such sales for the year ended January 31, 1943, were approximately \$65,000,000.00, and plaintiff derived a profit in excess of \$1,500,000.00 therefrom.

5. In May, 1944, and for a long time prior thereto, the names "Lerner" and "Lerner Shops" identified in the minds [3] of the purchasing public low-priced women's wearing apparel of the very latest styles and good fashion emanating from Lerner Stores Corporation; the names "Lerner" and "Lerner Shops" have been acknowledged and accepted by the purchasing public throughout the United States and throughout the State of California as identifying the retail stores and merchandise of plaintiff, and such names have come to have a value far in excess of \$3,000.00 in connection with the sale, distribution and merchandising of women's wearing apparel because associated in the minds of the purchasing public with plaintiff's wearing apparel as above described.

6. Prior to May, 1944, defendant, Wilfred A. Lerner, was engaged at San Francisco, California, in association with his father, L. G. Lerner, in the manufacture and sale at wholesale of women's coats and suits under the business name of "L. G. Lerner." As a result of the conduct of such manufacturing and wholesale business defendant well knew of plaintiff's existence and well-established business and good reputation.

7. On or about June 1, 1944, defendant conceived the idea of defrauding and damaging plaintiff and appropriating a part of plaintiff's goodwill by engaging, in San Jose, under the name of Lerner's, in the same business as plaintiff's well-known and long-established business, and thereby causing defendant's business to be thought of by the public as belonging to plaintiff's long-established and well-known group of stores. In furtherance of his said idea, defendant inserted a series of advertisements in the newspapers published and circulated in San Jose and the surrounding communities which were calculated to convey to the public the idea that one of plaintiff's well-known retail stores was commencing business in San Jose. Beginning on May 28, 1944, and continuing each day thereafter until the opening of defendant's store on June 1, 1944, [4] defendant's advertisements in said newspapers read as shown on the copy of such advertisements which is attached hereto as Exhibit "A", and hereby made a part hereof. In said advertisements the name "Lerner" was printed as the outstanding part, and was written in script letters similar to the lettering often used by plaintiff to identify plaintiff's business.

On May 31, 1944, defendant's advertisement in said San Jose newspapers stated as is shown on the copy of such advertisements which is attached hereto as Exhibit "B," and hereby made a part hereof.

On June 2, 1944, defendant's advertisement in

said San Jose newspapers stated as is shown on the copy of such advertisements which is attached hereto as Exhibit "C," and hereby made a part hereof.

On June 9, 1944, which was the beginning of the second week of the operation of defendant's new business, defendant's advertisement in said San Jose newspapers stated as is shown on the copy of such advertisements which is attached hereto as Exhibit "D," and hereby made a part hereof.

8. Since June 1, 1944, defendant has engaged at San Jose in the conduct of said retail store for the sale of women's apparel at low prices under the name of "Lerner's" and "Lerner Apparel," and defendant has continuously and prominently advertised and represented his business as Lerner's, San Jose, and has displayed and emphasized the name Lerner's, as hereinabove described, upon his place of business and in his advertising. Defendant has failed to disclose or indicate any part of his name other than said surname of Lerner.

9. The use by defendant of the name "Lerner" without any distinguishing feature which would differentiate it from plaintiff's business, the use of the name "Lerner" in the possessive form "Lerner's" followed by the reference to an address [5] in San Jose, the writing of said name in script letters as above described, and the advertisements published by defendant in connection with the opening of his new business were deliberately and wilfully done by defendant for the purpose of defrauding and damaging plaintiff and appropriating a part of

plaintiff's goodwill. Such use of the name "Lerner" and such advertising were calculated to, and did deceive members of the public, by causing them to believe that plaintiff was opening one of its chain of retail stores in San Jose, and thereby defendant was enabled to attract members of the public who had been accustomed to patronize plaintiff's stores.

10. Said acts of defendant have caused patrons who would otherwise patronize plaintiff to patronize defendant, and have diminished the value of plaintiff's goodwill by depriving plaintiff of the exclusive use in its business of the name "Lerner" for the purpose of identifying said business, and by causing members of the public to associate said name with a retail store engaged in the same kind of business but which is not a part of or connected with plaintiff's business, and to cause said name "Lerner" to lose in the minds of the public its distinctive association with retail stores operated by and merchandise emanating from plaintiff. Plaintiff has been damaged by the acts of defendant to the date of this complaint in the sum of \$50,000.00; said acts of defendant will result in further pecuniary damage and injury to plaintiff, the amount of which cannot yet be ascertained. Plaintiff prays leave to amend its complaint so as to insert the amount of such additional damage when it shall have been ascertained.

11. The effect of defendant's advertising and conduct is to convey a misrepresentation to, and to confuse the purchasing public in that the ordi-

nary purchaser is led thereby to believe that the defendant's store is one of plaintiff's [6] stores and is selling plaintiff's merchandise, when in truth and in fact defendant does not sell plaintiff's merchandise and is not connected with plaintiff.

12. The effect of defendant's advertising and conduct is such that it will cause confusion in the public mind and damage to plaintiff if the name "Lerner's" or "Lerner" is used by defendant in his store, in his advertising, in his dealings with his customers or in any other manner in the conduct of a business similar to the business carried on by plaintiff. The experience and contacts of defendant prior to opening his retail store in San Jose were never such as to invest his name with value as a proper means of identification of retail stores or of merchandise with the distribution of which he was in any way connected. The only commercial value of defendant's name when he opened said store lay in the likelihood that it would lead the purchasing public and others to mistake the store and merchandise which it ostensibly identified for plaintiff's stores and merchandise known as "Lerner's" and "Lerner Shops."

13. The defendant's conduct as above set forth is a fraud upon the public and a source of damage to plaintiff and constitutes unfair competition with plaintiff in that it operates and will continue to operate to deprive plaintiff of sales, and to diminish and dilute the value of plaintiff's goodwill, which

has been built up and depends upon the use of the name "Lerner" and "Lerner Shops."

14. Plaintiff first learned of defendant's conduct and actions on or about June 30, 1944. Plaintiff requested of defendant in writing that he change the name under which his store is operating and advertised so that there would not be any confusion or unfair competition between defendant's new business and plaintiff's long-established and well-known business. Defendant has persisted in his actions and conduct as [7] above alleged and has refused to make any change therein whatsoever.

15. Defendant intends and threatens to continue to make use of the name "Lerner" without the permission or authority of plaintiff and in the foregoing deceptive and injurious manner. Such threatened acts of defendant will, if permitted to take place, cause the present and prospective customers of plaintiff and other members of the public to be deceived and misled and will cause further and repeated injuries to the plaintiff. Such acts would, if permitted, further impair the plaintiff's rights in the exclusive use in the type of business conducted by plaintiff of the name "Lerner" and would further impair the value of plaintiff's right, which value the plaintiff has obtained through the association, exclusively, of said name in the minds of the public with merchandise emanating from the plaintiff and with the retail stores conducted by plaintiff. It would be extremely difficult to ascertain the amount of compensation which would afford

adequate relief by way of damages for the acts so threatened. The injury from such acts would be great and irreparable. The plaintiff has no plain, speedy or adequate remedy in the ordinary course of law.

Wherefore, plaintiff prays that defendant, Wilfred A. Lerner, his agents, employees and servants, and each and all of them, be perpetually restrained and enjoined from using the names "Lerner's" or "Lerner" in the business of selling women's wearing apparel at retail, or doing any other act which would lead the public to believe that any business conducted by defendant belongs to or is in any way connected with the plaintiff or supplying merchandise emanating from plaintiff; that plaintiff recover judgment against defendant for damages in the sum of \$50,000.00; that defendant be ordered to pay the costs of [8] this suit; that a preliminary injunction of the same tenor and effect as herein-before prayed for in respect to said perpetual injunction be issued against defendant; and that plaintiff may have such other and further relief as the circumstances of the case may require and to the court may seem in accordance with equity.

JESSE H. STEINHART,

By S. A. LADAR,

Attorney for Plaintiff. [9]



EXHIBIT. A.

SAN JOSE MERCURY HERALD  
(also in San Jose Evening  
Wednesday, May 31, 1944 News)

on May 30, 1944

# LADIES

For You Soon

*Lerner's*

70 South First St.

# WATCH AIT



San Jose News  
(Evening)

MERCURY HERALD

Wednesday, May 31, 1944  
Thursday, June 1, 1944

"Tomorrow's Store Today"

Lerner's

70 S. FIRST ST., SAN JOSE

Now Ready for Your Approval

Opening Thurs., June 1



SAN JOSE'S  
Newest, Smartest  
Shop for Women

Offering  
New Summer  
Clothes  
Dresses - Sportswe  
Blouses - Sweaters  
Advance Fall Coa  
and Suits

The Shop which  
you've in mind.



AMBIT.C.

SAN JOSE EVENING NEWS, FRIDAY, JUNE 2, 1944

# Lerner's

"Youthful Feminine Apparel!"

70 S. FIRST ST., SAN JOSE

**Makes A  
Spectacular  
Entrance!**



Presenting For Your Approval  
A Complete Line Of  
**COATS - SUITS - DRESSES  
SPORTS and CASUAL CLOTHES  
BLOUSES - SWEATERS - SKIRTS**

The Shop with  
you in mind



EXHIBIT.D.

SAN JOSE EVENING NEWS, FRIDAY, JUNE 9, 1944



## Super Fashions

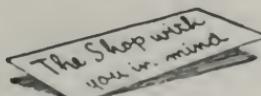
Just arrived —————  
new selections for your approval.

May we take this opportunity to express our  
appreciation for your acceptance of our store.  
As always—

"Youthful Feminine Apparel"

*Lerner's*

70 S. FIRST ST., SAN JOSE





State of New York,  
County of New York—ss.

Graham Magee, being first duly sworn, deposes and says:

That he is an officer of Lerner Stores Corporation, the corporation herein, to-wit, its Vice President; that he makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein set forth on information and belief and as to those matters that he believes it to be true.

GRAHAM MAGEE.

Subscribed and sworn to before me this 28th day of August, 1944.

[Seal] /s/ FRANCES SCHUMACHER,  
Notary Public, N. Y. Co. Clk's No. 713, Reg. No.  
1089-S-5.

My Commission Expires March 30, 1945.

[Endorsed]: Filed Sept. 7, 1944. [14].

---

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

## Second Defense

(1) As to paragraph 1 of the complaint: Defendant admits that defendant is a citizen of the State of California.

(2) As to paragraph 2 of the complaint: Defendant admits that plaintiff is engaged in selling low priced women's wearing [15] apparel at retail; and denies that plaintiff's business and all of its stores are known, designated or referred to by the purchasing public as "Lerner's" or are associated in the minds of the purchasing public with wearing apparel of the very latest styles or good fashion; denies that plaintiff has for over 28 years last past been continuously engaged in the sale at retail of low priced women's wearing apparel through a group of stores located in the populous cities throughout the United States; denies that plaintiff's business and all of its stores are known, designated or referred to by the purchasing public as "Lerner's" and are associated in the minds of the purchasing public with wearing apparel of the very latest styles and good fashion, at very reasonable prices; defendant avers that he is without knowledge and information sufficient to form a belief as to plaintiff's alleged "specialty," or as to the number and location of plaintiff's stores, and upon that ground denies said allegations and each of them; defendant avers that he is informed and believes and therefore alleges that plaintiff has not legally acquired the goodwill of any predecessor corporation, and that plaintiff's

use of the name of a former corporation is not equitable and concessionable, and comprises a fraud upon the public, as more particularly hereinafter set forth; defendant avers that plaintiff's stores sell at retail and are associated in the minds of the purchasing public as retail stores dealing in cheap merchandise, priced, styled and fashioned accordingly; that defendant deals in women's apparel of a superior grade, at higher prices, a store which presents, in appearance, a distinctive background appropriate to the high grade of merchandise sold therein and substantially different from the appearance of plaintiff's stores; that the goods sold by plaintiff are and have been sold by plaintiff in stores under the designation of "The Lerner Shops" and "Lerner Stores Corporation" which latter designation is the name of plaintiff corporation. [16]

(3) Defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the complaint, and upon that ground denies said allegations and each of them, except that on the 12th day of July, 1944, the attorneys for plaintiff addressed a letter to the attorneys for the defendant in which it was stated that the plaintiff had "some time ago leased premises in the City of San Jose to be opened as a Lerner store as soon as reconstruction work is permissible."

(4) As to paragraph 4 of the complaint, defendant denies that plaintiff's business has been

increased and developed by means of the continuous presentation to the purchasing public of the name of "Lerner" and denies that by means of presentation of said name, plaintiff has established a large, continuous and profitable volume of sales through the medium of its retail stores, associated in the minds of the purchasing public with the name "Lerner"; and in this connection defendant alleges that plaintiff does not and has not ever expended any effort or money in the presentation to the purchasing public of the name "Lerner" in connection with its retail business in California, and has never advertised or represented or presented itself or its stores as "Lerner" nor is the merchandise sold therein sold under the name of "Lerner"; that plaintiff does no advertising of any kind or description other than by signs on its store fronts, and by printed matter on its packaging, and in this advertising plaintiff consistently does and has used the name "Lerner Shops" and "Lerner Stores Corporation" and none other; and as to the other allegations of said paragraph defendant has no knowledge or information sufficient to form a belief.

(5) As to paragraph 5 of the complaint defendant denies that in May, 1944, and for a long time prior thereto, the name "Lerner" identified in the minds of the purchasing public low-priced women's apparel of the very latest design and good fashion emanating from Lerner Stores Corporation and denies that the name "Lerner" [17] has been acknowledged and accepted by the purchasing pub-

lie throughout the United States and throughout the State of California as identifying the retail stores and merchandise of plaintiff; admits that the name "Lerner Stores" has become identified in the mind of that portion of the purchasing public in close proximity to any store of the plaintiff which knows of plaintiff's stores, as a store which sells low-priced women's wearing apparel under the name of "Lerner Shops" and identifies the merchandise therein as that of "Lerner Shops"; and as to the other allegations therein contained defendant has no knowledge or information sufficient to form a belief.

(6) As to paragraph 6 of the complaint defendant denies that he knew of the good reputation of plaintiff and admits that prior to May, 1944, defendant was engaged at San Francisco, California, in association with his father, L. G. Lerner, in the manufacture and sale at wholesale of women's coats and suits under the business name of "L. G. Lerner"; and in this connection avers that for several years prior to 1944 defendant and his father, L. G. Lerner were engaged in the sale and manufacture of said women's apparel, with principal offices and factory at San Francisco, and that is said business was known, designated and referred to by its customers and purchasing public as "Lerner's Apparel," "Lerner's" and "L. G. Lerner" and "L. G. Lerner's," and were associated in the minds of their customers and the purchasing public with women's cloaks and suits of high quality and fashionable design; that defendant, in as-

sociation with his said father, sold and distributed their said garments throughout the Counties of San Francisco, San Mateo and Santa Clara, among others, in the State of California, and over a period of several years last past, have become known to their customers and to the purchasing public as dealers in women's wearing apparel, operating under the name of "Lerner's", "L. G. Lerner's" and "Lerner's Apparel," and had established a large [18] volume of sales and a profitable business, which said business was known under said names.

(7) As to paragraph 7 of the complaint, defendant admits that he advertised in the San Jose newspapers in the manner set forth in plaintiff's exhibits "A" to "D" inclusive, on the dates therein alleged, but denies that defendant ever used the name "Lerner" as identifying his stores, and denies that he ever used the name "Lerner" in his newspaper advertising or in any other advertising; admits that consistently in his advertising the name "Lerner's" and "Lerner's Apparel" have appeared in script letters, and denies that plaintiff has used similar lettering to identify its stores in San Francisco, which stores are those of plaintiff which are geographically closest to that of defendant in San Jose, and in this connection defendant alleges that all of the signs appearing on plaintiff's stores and on its packages and other advertising media in and on its stores in San Francisco, California, and all of its printed matter bearing plaintiff's name is in block letters, in some cases

the letters in the name "Lerner Shops" appearing on the front of plaintiff's stores in San Francisco are so arranged as to form an inverted "V" thus constituting a legend entirely distinct from that flowing script lettering, sloping upward to the right, consistently and customarily utilized by defendant in all of his advertising. Defendant denies that he has conceived the idea of defrauding, damaging or appropriating, or has defrauded or damaged or appropriated a party or any of plaintiff's good will by engaging, in San Jose, under the name of "Lerner's" in the same business as plaintiff's, and denies that he has caused his said business to be thought of by the public as belonging to plaintiff's group of stores, and denies that defendant's advertisements in newspapers in San Jose and surrounding communities were calculated to convey to the public the idea that one of plaintiff's retail stores was commencing business in San Jose. Defendant [19] alleges that defendant's newspaper advertising in San Jose and surrounding territory was of such character and form as to clearly distinguish defendant's business from that of plaintiff's, in that plaintiff does no newspaper advertising so that any advertising defendant did could not have been a copy or imitation of plaintiff's and that the type of printing used by defendant in his said newspaper advertising was in the distinctive script, as aforesaid, which further clearly distinguished it from that of plaintiff and that the text and formation of said advertising was such as to convey the impression that it referred to a

store dealing in merchandise of high quality, priced accordingly, and thus clearly distinguishing it from plaintiff's stores which deal in low priced goods.

(8) As to paragraphs 8, 9, 10, 11, 12, 13, 14 and 15 of the complaint, defendant admits that since about June 1, 1944, he has engaged in business in San Jose in the conduct of a retail store for the sale of women's apparel and has advertised his business as "Lerner's, San Jose" and "Lerner's Apparel" and denies all the other allegations therein contained; defendant alleges that he did so believing that no confusion with plaintiff would result and that no substantial confusion to the detriment of plaintiff has resulted, for the reason that defendant has in all of his advertising used a distinctive name, form of lettering and type of advertising, and has actively advertised, while plaintiff has not advertised and has not engaged in business in a locality wherein defendant's store is located and plaintiff has no store within a distance of approximately fifty miles from defendant's store; that defendant has dealt in and continues to deal in and intends to continue to deal in a class of merchandise which is superior quality and generally higher in price than that of plaintiff, and operates a store the character and appearance of which is so distinctive and different in every material respect from that of plaintiff's stores that no ordinary person on seeing defendant's [20] store would confuse it with those of plaintiff. That defendant first learned of plaintiff's intimation of alleged confusion shortly after June 30th, 1944, and

immediately thereafter defendant carefully instructed his employees to inform all persons and customers who might raise the point or appear to be under the impression that there existed some connection between plaintiff and defendant, that no such connection existed, and that defendant's store was entirely "home owned" and was not part of any chain of stores, and in particular had no connection whatsoever with "Lerner Stores Corporation" or "Lerner Shops," and that the quality of merchandise carried by defendant was superior to that carried by plaintiff; and thereupon defendant caused all of his newspaper advertising to be so altered as to include the words "Home Owned," prominently displayed, and caused the words "Home Owned" to be placed on the large sign in front of his store, prominently displayed, in conjunction with the words "Lerner's Apparel," and caused a printed sign reading "Home Owned" to be placed in the window of his store, prominently displayed, thereby adequately informing prospective customers that defendant's store was not connected in any way and was not a part of a chain organization such as that of plaintiff; and defendant further, caused a news item to appear in the newspapers of San Jose in which the independence of defendant's store and the fact that it was not a member or part of a chain organization was prominently and clearly brought out; and that thereafter, and further, defendant has given instructions, now being carried out, and has notified plaintiff that the large sign over the front of

his store should be so altered as to add thereto the word "Wilfred" prominently, to the words thereon appearing, so that the said sign will read "Wilfred Lerner's Apparel—Home Owned," Wilfred being the given name of defendant; that defendant's true name is and always has been "Wilfred Lerner" and for many years last past has done all of his business under [21] that name, and in conjunction with his father, for several years last past, had been engaged in the manufacture and sale of women's cloaks and suits in San Francisco, San Mateo and Santa Clara Counties, under the name of "Lerner's" and "L. G. Lerner" and by so doing has created a large and valuable good will. That defendant has lived for several years last past and has done business in the general neighborhood and country surrounding the district in which he now operates his present business and both he and his wife, who is actively engaged in social activities in the same district, are well known in said districts, and enjoy a good reputation, and are generally known in said districts as the "Lerners," all of which are valuable assets to defendant in the operation of said business. That since the opening of defendant's business on the date aforesaid, there has resulted no confusion between defendant's business and that of plaintiff, and to his knowledge no one has been mislead or deceived and further, that in view of the higher character of defendant's store and merchandise any confusion which might arise would be to the advantage of plaintiff and to the detriment of defendant. That defendant is

honestly and justifiably using his own name in the operation of his business, and is so using it in a geographical location in which plaintiff has no store and has no substantial business, and in which location plaintiff has invested neither funds nor effort to promote trade for itself.

### Third Defense

Defendant is informed and believes, and upon such information and belief, alleges, that plaintiff is and has been perpetrating a fraud upon the public in the use of the name "Lerner Stores Corporation" and "Lerner Shops" by reason of the following circumstances: Prior to about October 1, 1932, a certain corporation known as Lerner Stores Corporation, incorporated under the laws of the State of Maryland, hereinafter referred to as the predecessor corporation, was engaged in the same business and under the same [22] name as plaintiff. On or about said date said predecessor corporation caused its name to be changed to Realty Corporation of America, or a similar name not indicating any connection with its former name, Lerner Stores Corporation, and thereupon filed a voluntary petition in bankruptcy under said changed name. The purpose of said change of name was to conceal from the public the fact that a corporation by the name of Lerner Stores Corporation had filed a petition in bankruptcy. Thereafter in a manner the details of which are not now known to defendant, plaintiff acquired the business and assets of said predecessor corporation and has

since used the identical name that had theretofore been used by the predecessor corporation. Plaintiff corporation was owned and controlled by the same persons as was the predecessor corporation and the purpose of said transaction above described was to conceal from the public the fact that Lerner Stores Corporation had commenced bankruptcy proceedings.

Wherefore, defendant prays that he be dismissed hence with his costs of suit.

HENRY ROBINSON,

Marcel E. Cerf, Robinson &  
Leland

By HENRY ROBINSON,

Attorneys for Defendant.

State of California,  
City and County of San Francisco—ss.

Henry Robinson, being first duly sworn, deposes and says:

That I am one of the attorneys of the defendant in this action; that I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to those matter I believe it to be true. The reason this verification is not made by the

defendant is that he is absent from the County of San Francisco, in which County I have my office.

**HENRY ROBINSON.**

Subscribed and sworn to before me this 15th day of November, 1944.

(Seal)            **LOUIS WIENER,**

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 15, 1944. [24]

---

[Title of District Court and Cause.]

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The above entitled cause came on regularly for trial on the 26th day of April, 1945, before the above named Court, sitting without a jury, Honorable Louis E. Goodman, judge thereof, presiding, Jesse H. Steinhart, Esq., counsel for plaintiff, appearing by John J. Goldberg, Esq., and S. A. Ladar, Esq., and Marcel E. Cerf, Robinson & Leland, counsel for defendant, appearing by Henry Robinson, Esq., and Myron Wiener, Esq., and evidence both oral and documentary having been introduced and the cause submitted for decision, the Court now makes its findings of fact and finds the following facts and each of them, to be true:

## FINDINGS OF FACT

## I.

Plaintiff, Lerner Stores Corporation, is a [25] corporation incorporated under the laws of the State of Maryland in 1929. Defendant, Wilfred A. Lerner, is a citizen of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

In 1930, Lerner Stores Corporation, a corporation incorporated under the laws of the State of Delaware, was operating certain retail ladies ready-to-wear stores under the name "Lerner Shops." Three brothers named Lerner were previously operating similar stores and caused the incorporation of plaintiff. The capital stock of said Delaware corporation was owned by plaintiff, Lerner Stores Corporation, said Maryland corporation. In 1932, the assets and good will of said Delaware corporation were acquired by Lerner Shops of California, a corporation incorporated under the laws of the State of California. All of the capital stock of said California corporation was at the time of such acquisition, ever since has been and now is owned by plaintiff, said Maryland corporation. After said transfer of said assets and good will, said Delaware corporation caused its name to be changed to Outfitters Operating Realty Company, and under such name, was adjudicated a bankrupt under the bankruptcy laws of the United States, in 1932. Ever since 1932 said California corporation has

operated said "Lerner Shops" in the State of California. In 1934 said California corporation opened a ready-to-wear store under the name of "Lerner Shops" in the City and County of San Francisco, and another such store in the City of Oakland, California. In 1935 said California corporation opened another such store on Market Street, in the City and County of San Francisco, and in 1940 another such store in Stockton, California. At the time of the commencement of this action, said California corporation [26] was operating twelve such stores in the State of California, of which the only stores in Northern California were said stores in San Francisco, Oakland and Stockton, the remainder being in Southern California, from Bakersfield south, namely, Bakersfield, Santa Barbara, Pasadena, Huntington Park, Inglewood, Long Beach, San Bernardino and San Diego. One hundred sixty-eight other such stores under the name of "Lerner Shops" are owned and operated in forty other states of the United States by various corporations, of which all the capital stock is owned by plaintiff, said Maryland corporation.

### III.

Said "Lerner Shops" are without exception, situated in locations having the highest volume of pedestrian traffic, known as "100% locations," and rely in substantial part upon passing pedestrian traffic for their customers. The business of said "Lerner Shops" consists of the sale at retail, of low or popular priced ladies ready-to-wear wearing

apparel. Said "Lerner Shops" do not advertise in newspapers, periodicals, or in any other manner than in the use of the name "Lerner Shops" on the store fronts of the several stores, and the use of such name on paper and bag containers and price tickets attached to merchandise displayed in the show windows of said stores. No variation or abbreviation of the name "Lerner Shops" is used in such advertising. The customers of said "Lerner Shops" consist in substantial part of persons who comprise the pedestrian traffic passing the respective stores, consisting in each instance, principally of persons from within the city and its immediate environs where a "Lerner Shop" is situated, but including some persons from other areas throughout the United States and other places. [27]

#### IV.

Said California corporation, on or about January 31, 1941, leased certain premises at 152 South First Street, in San Jose, California, with the intention of conducting therein one of such stores. Performance of said lease was guaranteed by plaintiff. At the time of the commencement of this action, said premises were occupied by subtenants of said California corporation, and were not being used by plaintiff or any of its subsidiaries, for the purpose of conducting therein a retail ladies ready-to-wear store, in any manner whatsoever. Defendant had no knowledge of said lease or said intention, at any time prior to the opening of his business in San Jose, California, or at any time prior to about July 12, 1944.

## V.

Since about June 1, 1944, defendant has engaged in business in said City of San Jose (a city approximately 50 miles from San Francisco and Oakland) in the conduct of a retail store for the sale of women's apparel and has advertised his business as "Lerner's", "Lerner's, San Jose" and "Lerner's Apparel." Defendant commenced and conducted said business believing, in good faith, that no confusion of the public would result by reason of the use of his own surname, as aforesaid, between his business and the businesses operated under the name of "Lerner Shops," in San Francisco, Oakland and elsewhere. Defendant took reasonable precautions to prevent such confusion and no such confusion has resulted, and there has been no detriment or damage to plaintiff, or to any of said subsidiary corporations, by reason of any conduct, act, or declaration of defendant.

## VI.

The store operated by defendant in San Jose is of a character and appearance so distinctive and different in [28] every material respect from that of said "Lerner Shops," that no person of ordinary understanding and intelligence, and no person exercising ordinary care and no ordinarily observant purchaser would confuse it with said "Lerner Shops," or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with said "Lerner Shops." Defendant has performed no act or made any state-

ment or resorted to any artifice which would confuse, mislead or deceive the public into believing that defendant's store is one of said "Lerner Shops" or in any way connected with said "Lerner Shops" and no persons were so confused, misled, or deceived by any conduct, act or declaration of defendant. Defendant has performed no unfair act or made any unfair statement or resorted to any unfair practice to the detriment of plaintiff or any of its subsidiaries. Defendant advertises in newspapers published in San Jose and circulated principally in the City of San Jose and the immediately surrounding area. Such advertising was of such character and form as to clearly distinguish defendant's business from that of "Lerner Shops" and the text and layout of such advertising was such as to inform the public that defendant dealt in merchandise of generally higher quality and price than said "Lerner Shops" and that defendant catered to a higher class of trade than said "Lerner Shops." The style of lettering used by defendant on his store front and other advertising to display the name of his business is distinctive and different from the lettering used in the display of the name "Lerner Shops," the lettering used by defendant consisting of a continuous line script, arranged to run diagonally upward from left to right, which arrangement and lettering, and the text thereof, were so distinctive and different in every material respect from the arrangement, lettering and text used to [29] display the name "Lerner Shops" that no person of ordinary understand-

ing and intelligence and no person exercising ordinary care and no ordinarily observant purchaser would confuse defendant's store with said "Lerner Shops" or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with "Lerner Shops," or purchasing the merchandise of "Lerner Shops."

## VII.

Said "Lerner Shops" have not been advertised in and about the City of San Jose, and neither plaintiff nor any of its subsidiaries have engaged in the retail ladies ready-to-wear business in San Jose under the name of "Lerner Shops" or under any other name, or under any name including the word "Lerner." Defendant was first in the field in and about the City of San Jose in the retail ladies ready-to-wear business under a name including the word "Lerner." The business of defendant is in a separate and distinct geographical and trading area and in a separate business community from any of said "Lerner Shops." Neither plaintiff nor any of its subsidiaries, nor any of the "Lerner Shops" has or had entered into the retail ladies ready-to-wear field in and about the City of San Jose prior to the time when defendant commenced to do business therein, as aforesaid. Defendant has not done and is not doing business in any field, territory, area or market previously entered or occupied by "Lerner Shops," or any of them, or by plaintiff or any of its subsidiaries, or in which any of said "Lerner Shops" or plaintiff or any of

its subsidiaries were doing business prior to the time when defendant commenced to do business as aforesaid. The business conducted by defendant in San Jose is not in competition with the business of said "Lerner Shops" or any of them, or with the business of plaintiff or any of its [30] subsidiaries.

### VIII.

The Court does not find it necessary to make findings on any other issues presented in the pleadings.

## CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds:

### I.

Plaintiff is not entitled to a judgment or decree restraining or enjoining defendant, Wilfred A. Lerner, and his agents, employees and servants, or any of them, from using the name "Lerner" or "Lerner's" in his existing business of selling women's wearing apparel at retail in and about the City of San Jose, California.

### II.

Plaintiff is not entitled to a judgment against defendant for damages, in any amount.

### III.

Plaintiff is not entitled to any relief by virtue of the complaint on file herein.

### IV.

Defendant is entitled to judgment against plaintiff for his costs herein.

Let judgment be entered accordingly.

Dated: December 26, 1945.

/s/ LOUIS E. GOODMAN,  
Judge of the above named  
Court.

[Endorsed]: Filed Dec. 26, 1945. [31]

---

In the District Court of the United States, Northern  
District of California, Southern Division

No. 23662-G

LERNER STORES CORPORATION, a Corpora-  
tion,

Plaintiff,

vs.

WILFRED A. LERNER,

Defendant.

### JUDGMENT

The above entitled cause came on regularly for trial on the 26th day of April, 1945, before the above named Court, sitting without a jury, Honorable Louis E. Goodman, judge thereof, presiding, Jesse H. Steinhart, Esq., counsel for plaintiff, appearing by John J. Goldberg, Esq., and S. A. Ladar, Esq., and Marcel E. Cerf, Robinson & Leland, counsel for defendant, appearing by Henry Robinson, Esq., and Myron Wiener, Esq., and evidence both

oral and documentary having been introduced and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised, and by reason of the law and the findings of fact as aforesaid; and

Good Cause Appearing Therefor:

It Is Ordered, Adjudged and Decreed as follows:

I.

Plaintiff is not entitled to a judgment or decree restraining or enjoining defendant, Wilfred A. Lerner, [32] and his agents, employees and servants, or any of them, from using the name "Lerner" or "Lerner's" in his existing business of selling women's wearing apparel at retail in and about the City of San Jose, California.

II.

Plaintiff is not entitled to a judgment against defendant for damages, in any amount.

III.

Plaintiff is not entitled to any relief by virtue of the complaint on file herein.

IV.

That defendant have judgment against plaintiff for his costs herein, taxed in the amount of \$.....

Dated: December 26th, 1945.

LOUIS E. GOODMAN,  
Judge of Said Court.

[Endorsed]: Filed Dec. 26, 1945. [33]

[Title of District Court and Cause.]

NOTICE OF MOTION OF PLAINTIFF, LERNER STORES CORPORATION, A CORPORATION, FOR A NEW TRIAL

To the above entitled Court and to the Clerk thereof; to the Defendant above named and to Marcel E. Cerf, Robinson & Leland, Esqs., Attorneys for Defendant:

You and each of you will please take notice that on Monday, the 14th day of January, 1946, at 10 o'clock a.m. of that day or as soon thereafter as counsel can be heard at the courtroom of the above-entitled court, Honorable Louis Goodman, Judge thereof, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the plaintiff above named will move the above entitled court for a new trial and will request the court to open the judgment entered herein and amend the findings of fact and conclusions of law or to make new findings of fact and conclusions of law in the form set forth in plaintiff's memorandum served and filed herewith, and direct the entry of a new judgment herein in conformity with such changed [34] findings of fact and conclusions of law. Said motion and request will be made upon the following grounds:

1. Insufficiency of the evidence to justify the decision;
2. That the decision is against law;

Said motion will be based upon the minutes of

the court, the pleadings, records, papers, documents and evidence on file in said action, and the said plaintiff's memorandum served and filed herewith.

JESSE H. STEINHART,  
By JOHN J. GOLDBERG,  
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 5, 1946. [35]

---

District Court of the United States  
Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 30th day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: the Honorable Louis E. Goodman, D. J.  
[Title of Cause.]

Ordered plaintiff's motions for a new trial and to amend findings denied. [36]

---

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT  
COURT OF APPEALS

Notice Is Hereby Given that Lerner Stores Corporation, a corporation, the plaintiff above named, hereby appeals to the Circuit Court of Appeals for

the Ninth Circuit from the final judgment entered in the above entitled action on December 26, 1945.

Dated: April 29, 1946.

JESSE H. STEINHART,

By /s/ JOHN J. GOLDBERG,

Attorneys for Appellant, Lerner Stores Corporation, a Corporation.

MARCEL E. CERF,

ROBINSON & LELAND,

Attorneys for Defendant.

[Endorsed]: Filed April 29, 1946. [37]

---

[Title of District Court and Cause.]

**DESIGNATION BY PLAINTIFF OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL**

Comes now Lerner Stores, a corporation, plaintiff above named, and having filed herein its notice of appeal to the Circuit Court of Appeals, hereby designates for inclusion and to be contained in the record on said appeal the complete record and all proceedings and evidence in the above entitled action including, but not in limitation of the fore-

going all pleadings, the findings of fact and conclusions of law, the judgment, all of the evidence received at the trial of said action, including the testimony of the witness and all exhibits, a transcript of the proceedings on the hearing of plaintiff's objections and proposed amendments and additions to [38] findings of fact and conclusions of law proposed by defendant and a transcript of the proceedings on the hearing of plaintiff's motion for a new trial.

Dated: May 3, 1946.

JESSE H. STEINHART,

By JOHN J. GOLDBERG,

Attorneys for Appellant, Lerner Stores Corporation, a Corporation.

(Receipt of Service.)

[Endorsed]: Filed May 3, 1946. [39]

---

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. C. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 39

pages, numbered from 1 to 39, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Lerner Stores Corporation, a corporation, Plaintiff, vs. Wilfred A. Lerner, Defendant, No. 23662-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 4th day of June, A.D. 1946.

[Seal]            C. W. CALBREATH,  
                        Clerk.

By /s/ M. E. VAN BUREN,  
                        Deputy Clerk. [40]

In the Southern Division of the United States  
District Court in and for the Northern Dis-  
trict of California

Before: Hon. Louis E. Goodman, Judge.

No. 23662-G

**LERNER STORES CORPORATION**, a corpora-  
tion,

Plaintiff,

vs.

**WILFRED A. LERNER**,

Defendant.

### REPORTER'S TRANSCRIPT

Thursday, April 26, 1945

Counsel Appearing: For Plaintiff: Jesse H. Steinhart, Esq., by John J. Goldberg and Sam A. Ladar, Esq. For Defendant: Marcel E. Cerf, Esq., Robinson & Leland, by Henry W. Robinson, Esq.

The Clerk: Lerner Stores Corporation v. Wil-  
fred A. Lerner.

Mr. Robinson: Ready, your Honor.

Mr. Goldberg: Ready, your Honor.

The Court: You may proceed, gentlemen.

Mr. Goldberg: If your Honor please, on be-  
half of the plaintiff I would like to make a very  
brief statement. [1\*]

I know that your Honor is familiar, or was at

---

\* Page numbering appearing at top of page of original Reporter's Transcript.

one time familiar generally with the nature of this case. It is an action to enjoin the defendant, Wilfred A. Lerner, from doing business under the name of Lerner's, which is the name he was doing business at the time the action was commenced; or to use the name "Lerner" at all in the type of business, which is the sale at retail of ladies' wearing apparel; and for damages.

The plaintiff in this action and its predecessors in interest have since 1907 continuously used it as a name "Lerner" in the sale at retail of women's wearing apparel. Mr. Samuel A. Lerner, who was living in Oakland at that time, went to New York City and there engaged in the business, first, of manufacturing wearing apparel, and then in selling wearing apparel in the retail stores. He was joined by two brothers, Michael Lerner and Joseph Lerner. They expanded their operations from one store to approximately 180 stores now; and from one city to approximately forty-one States; from a nominal volume to a volume last year of \$87,000,000.

As the evidence will show, it was a matter of hard work, of plowing earnings back into business, paying close attention to business, of building up a valuable goodwill throughout the entire country as "Lerner's." We will show that the name is Lerner Corporation, and the sign on the windows is "Lerner Shops." Yet in the organization itself and in the [2] minds of the public and in actual use the name of this organization is "Lerner's" and its merchandise is referred to as "Lerner's."

We will show that it has a distinctive type of merchandise in that it is of the most up-to-date styles, that it sells under a policy which enables the company to obtain very reasonable prices which are below comparable prices for the same articles for the same general area. It is now the largest apparel chain in the world. There is no other apparel store anywhere in California or anywhere on the West Coast that uses "Lerner" in any part of its name except the defendant, Wilfred Lerner, in San Jose.

We will show this company from its idea at the beginning has had a definite expansion policy. It has expanded at every opportunity, according to a definite plan of beginning inside their stores, in populated areas, and making itself and its merchandise known in the outlying areas, through its merchandising policy and the opening of its stores in the outlying areas. In pursuit of that policy, in 1941 the company negotiated a lease in San Jose on the very same street the defendant has opened a store, and on the same block, on the same side of the street, and obligated itself to make a lot of repairs and contemplated a complete reconstruction of the premises. This lease had its beginning on July 1st, 1942. There were two stores there. The area is about thirty-five or [3] forty feet, and the entire area was intended to be used by the company for the operation of one of its stores. This lease, as a matter of fact, compels the company to use the premises for the operation of one of its stores with the exception of being permitted to sub-

let a space not exceeding ten feet wide by one hundred feet deep to somebody else; but everything else must be operated by this company as one of its regular stores in the customary manner and it is on the percentage basis.

However, when the lease term commenced, the war commenced and there were restrictions which prevented the company from engaging in the substantial reconstruction required. As a result, the company has continued to sublease or sublet the premises at a rent less than it is obligated to pay as a minimum rent, and which it is paying.

We will show, furthermore, that in addition to this lease in being a part of its normal expansion program and one that was well visualized years before that, actually, San Jose and the area between here and San Jose is within the normal trading area, actual trading area of the store of Lerner's in San Francisco. The two stores in San Francisco and the one store in Oakland are in the normal trading area for other large retail organizations in the Bay Area. They have actual customers from San Jose, regularly and continuously in a substantial amount.

We will show, furthermore, that there has been actual [4] confusion in the minds of the public as to whether or not the store of the defendant at San Jose is a store of the plaintiff, that certain people have confused it and certain people have come to believe that the merchandising policy of the company has changed in that they were not treating their people the same way in San Jose as in the other stores with which these people were familiar.

We will show, furthermore, so far as the defendant is concerned that he has never been in the retail business before in any line; that he never had a place of business before in San Jose, that he did not live in San Jose when this store was opened by him; that he did not open it under his name, which is Wilfred Lerner; but he opened it as "Lerner's;" that he advertised for approximately two weeks purely as "Lerner's" without indicating in any way that he had any type of merchandise that the plaintiff didn't have or any price line which plaintiff didn't have. He advertised, primarily, the name "Lerner's," which we will show did not refer to him, but referred only to the plaintiff; that after the plaintiff told him of this cause of action and a very long time after the complaint had been made the defendant made some changes, half-hearted changes in the way he designated himself in his business.

We will show, and I think the cases will show, that that in and of itself is not conclusive and wouldn't have been [5] conclusive in the first place; and in the second place could not undo the damage which the defendant has done to the plaintiff, not only in the matter of actual confusion of customers in particular transactions, but in the damage to the reputation of the plaintiff, which is long established, well known among the people who deal with and know about the plaintiff; and that the defendant has, either wittingly or unwittingly, which is for your Honor to determine—and I think it is immaterial under the circumstances—masqueraded as

the plaintiff and has damaged the reputation of the plaintiff; that under those circumstances it would not be equitable to permit him to continue in that business under a name which contains the name of Lerner's, that while his name is "Lerner" the circumstances under which he commenced this business and has continued it are such that we are now justly and equitably entitled to require that he carry on his business under a name which does not contain that of "Lerner" in order to prevent any further confusion which is bound to exist, even though he may have had some qualifying allegation to the name under which he has been doing business for most of the time since June, 1944.

The Court: This is a suit under unfair competition?

Mr. Goldberg: Yes, your Honor.

The Court: I am not quite clear as to what the taking of this lease at San Jose has to do with this case. [6]

Mr. Goldberg: It is only one of the elements in the proof that the plaintiff is not only doing business with the people in San Jose, but in the normal expansion of and expanding a business having a history of expansion, having a policy of expansion, that in their normal expansion policy, San Jose is within the area where this company would normally do business under the name of "Lerner's." "Lerner's Shops" is known to the public as "Lerner's."

The Court: Of course, if somebody else opened a store which was not in unfair competition in any

way, it wouldn't make any difference if plaintiff had a lease.

Mr. Goldberg: I don't believe it would militate against the plaintiff's claim if it didn't have a lease there. I think the fact it has a lease merely corroborates its policy of expanding into that area.

The Court: That it intended to go to San Jose?

Mr. Goldberg: Yes, that it plans to go to San Jose.

The Court: Of course, that wouldn't have any relevancy unless it was unfair competition.

Mr. Goldberg: I think that is true. If this company's stores had all been in New York and its reputation was confined to New York, and if it decided to open a store in San Jose, I think the matter of the lease might be material.

The Court: I had this matter up on pre-trial. It seemed to me at the time the question was whether, first [7] of all, the way the defendant conducted his business was by way of unfair competition; and secondly, whether it was within an area, or the field within which unfair competition would have been followed.

Mr. Goldberg: That is true, but I think that in the matter of unfair competition there are two elements, and, I think, well established in the authorities, first, whether or not the area involved, San Jose, is within the trading area of the company's existing stores; and secondly, whether it is within a normal expansion area of a company having a policy of expansion; in other words whether nor-

mally that is the place they would go next, or where they are known.

The Court: Doesn't it amount to this, that if the San Jose area was within the trading area of San Francisco, a man could still open the same kind of a store down there, unless it did not have the effect of deceiving the buying public into believing it was a store of the plaintiff's. The trading area doesn't have anything to do with it unless there is an attempt to pirate or deceive the public. It wouldn't make any difference whether it was ten miles or one mile away.

Mr. Goldberg: Aside from this question of intent. If this man opened a similar store but without any elements involving any infringement of the plaintiff's rights, any confusion or deception of the public, then, I don't think we would have any problem. [8]

The Court: Supposing he opened a store at Gilroy and it appeared as if he were setting himself up as a Lerner's store, it might be that is unfair competition, too. On the other hand, if he opened a store at Millbrae, or San Mateo, just a few miles below San Francisco, it shouldn't have the effect of any deception. There wouldn't be unfair competition.

Mr. Goldberg: Of course, we stand with the proposition that the name "Lerner" is used by both parties and we know that there is bound to be some confusion in people in the same line of business using the same name if the name of the style or user is well known and has been known to prospective patrons in that area.

The Court: That was what I was endeavoring to say.

Mr. Goldberg: Yes.

The Court: If he opened a store in Ukiah and nobody knew about Lerner Stores, there wouldn't be any difference whether he used the same name or continued at his business in the same way; and nobody would be deceived because they wouldn't know about Lerner's Stores.

Mr. Goldberg: That would be true, subject to one qualification that seems to be pretty well established; and that is, if it could be said on the basis of all the history that Ukiah was within the normal expansion area and that the company was in all likelihood going to go into Ukiah or with the name "Lerner" the defendant might have a problem. [9]

The Court: I think that that would have to be within certain reasonable limitations; because otherwise some firm that established itself through its efforts over some area could assume nobody would go into business anywhere in the United States, because the whole country would be its area of expansion. You would have to have very definitely reasonable limits to that.

Mr. Goldberg: Yes, but they are in practically in every state.

The Court: I don't want to interrupt you, but I wanted to get that clearly in my mind.

Mr. Goldberg: Yes, your Honor.

Mr. Robinson: I may say I had intended to point out to the Court personally the things which the Court itself has pointed out to Mr. Goldberg.

May I proceed, first, upon the theory that Lerner Stores Corporation by reason of its prior use of the name "Lerner" can legally prevent Wilfred A. Lerner the defendant, from using his own name in his own business. That is the assumption that is made by Mr. Goldberg; that if other elements were present, that is, if the two stores were side by side in the same city, leaving aside the geographical question for the moment, the law gives the Lerner Stores the right to prevent Mr. Lerner from using the same name. The second theory [10] seems to be that by reason of the use in San Francisco and elsewhere, the Lerner Stores Corporation may preempt the entire field and Mr. Goldberg intimates that is his reasonable conclusion from his statement that on that theory anybody, even someone not named "Lerner," but anybody else who wanted to use the name Lerner—let us assume it is a name capable of appropriation as against another one who has not that family name—they have the right to preempt it in certain places where they intend to go in the future.

There is the point which the Court called attention to Mr. Goldberg, which is one of the real points in the case, and that is whether or not regardless of whether it is San Jose or Gilroy or any other place, whether these two establishments are in fact competing with each other. And that is a mere element in the ultimate decision and it is not the controlling element; but it is one of the things, for example, what I had in mind: Two stores across the street from each other or a block away

from each other would not have to be greatly dissimilar in order to play fair with the public and with each other; whereas, if one of them were at Gilroy or Fresno, and the other was in San Francisco, some similarity might not lead to confusion, whereas that same similarity in the same neighborhood might lead to confusion. So that, in that effect, the distance between the stores may or may not be material. [11]

By discussing the question of similarity I don't mean to intimate there is any charge of similarity here. As a matter of fact, there is great dissimilarity.

The Court: That is the real question of fact, I suppose, in the case.

Mr. Robinson: Yes, that's right. Now, before stating the facts, I think I might call to the attention of the Court and to Mr. Goldberg a case which he has apparently overlooked, because from the tenor of his remarks it is obvious that he is proceeding on the theory the name of "Lerner" is exclusive appropriation to his client.

I am reading from 73 Cal. App. 412, where the Court quotes from a California case:

"The right to do business under one's own name is one of the sacred rights known to the law, and a family name is incapable of exclusive appropriation and cannot thus be monopolized."

That disposes of Mr. Goldberg's first point, namely, that the mere fact that the Lerner Corporation has in it some members of the family named

Lerner, that that gives them the actual right to use "Lerner."

The Court: There are lots of other cases on the subject. I think people who have the same family name have been restrained many times from pirating the names.

Mr. Robinson: That's right, if it is fraud or deception. [12] I may say at the outset there is a difference between a products case and a widely advertised case of conflicting advertising.

The Court: There are cases of a similar nature and most of the cases where they deal with family names are products cases.

Mr. Robinson: I don't know of any case where a name on the store was enjoined in the absence of a deliberate attempt to defraud or deceive.

The Court: I don't want to interrupt you, but I think it is time to develop the facts. The important question is here, how is the defendant conducting his business?

Mr. Robinson: In point of confusion, the cases are to the effect where there is a different type of name—confusion is an element in trade name cases, but not family name cases where confusion is the result of the circumstances themselves, that the two parties have the same name, neither can be enjoined.

The Court: I am not so sure about that. If your client opened his store right next to the Lerner's in San Francisco in the same block, using the same name and doing the same kind of business,

there wouldn't be refuge in that because he had the same name.

Mr. Robinson: I am merely outlining what the law is, but I would say that the situation as we will present it will [13] show that there are adequate distinctions and that we need not rely on this absolute statement that we haven't an absolute right to interfere with these people.

The situation as we will present it is this: Wilfred Lerner was engaged with his father for many years, since sometime in the '30's, in the business selling at wholesale, manufacturing and selling ladies' coats and dresses, that in the course of that business they sold to retail outlets such as he himself is doing now, and in the course of that business he became familiar with the retail ladies' ready-to-wear business and decided in 1938 or 1939, or even earlier, that he was going to go into the retail business for himself when an appropriate time came, that about nine years ago, or about nine years prior to the commencement of the action, he took up his home in Palo Alto, where he lives with his wife and daughter, that while living in that community, he commuted to San Francisco to continue the business with his father. They did business under the name of L. G. Lerner. While living in that community he had in mind his intention of going in business down there and had in mind the intention of going in business under his name. I don't know at the moment whether Lerner Brothers were in business in 1936. That will come out in the proof. In 1939, for the first time, he got as

far as negotiating for a lease. Again, in 1940 or 1941, he negotiated for another lease and the deal [14] fell through; and finally, early in 1944, he was successful in obtaining this place. That he would have moved to San Jose from Palo Alto immediately upon making the lease for the store, but the housing situation being what it was, that his residence was not actually taken up at San Jose, though he rented the premises sometime before until a few days after the opening of his store, June 1st, 1944, that he opened up under the name "Lerner," that he used a distinctive script of lettering; whereas the plaintiff here, so far as we know, uses strictly blocked letters and uses the name "Lerner Shops" or, "The Lerner Shops."

The reason he desires to use his own name is that his wife and himself were active in the community activities down the Peninsula. His wife belonged to a number of organizations, Red Cross, relief organizations, social and charitable organizations; that that organization work took her frequently into San Jose; that these chapters were frequently centered in San Jose and these people are well and widely known in Palo Alto and in San Jose and they have a pride in their name and want to use it for that reason. They never knew anything about the intention of Lerner Shops to go down there. They ran a few opening ads merely saying, "watch for the opening of Lerner's," or words to that effect. They advertised about once a week; so there were three ads run between the end of May

and the 9th of June. The store opened on the 1st or the 2nd. [15]

The advertising, incidentally, is only in the San Jose papers. There is one morning and one evening newspaper and, as I say, one ad a week was used. So there were three or four ads from the end of May to the 9th of June, which were institutional ads, merely advertising the opening of Lerners without indicating any type of merchandising or anything of that kind; and after the 9th the ads were advertising merchandise with the name being at the bottom of the cut. Then, about July 12, Mr. Lerner received a letter from plaintiff's counsel telling him that he was infringing upon their rights and also informing him about the reason, which was the first information they had that they ever intended to come down there and demanding he desist from the use of his name. Subsequently, as your Honor knows, negotiations ensued so that the parties could be appeased and each counsel went their respective ways using such names as they desired without putting it in issue here, so to speak. Things fell through and we are here today. In the meantime, however, Mr. Lerner has done this: As I say, the original sign was in script over the place of business, sixteen feet wide, a distinctive script prepared by an artist, I believe, with the word "Lerner's" and under the word "apparel." Immediately after the receipt of the letter from plaintiff, Mr. Lerner added the words "home-owned," to his sign and to his advertising; that thereafter, after negotiations and discussions he proposed to

add the words, "W. A." to "Lerner's" and [16] plaintiff indicated he wouldn't be satisfied with that. So Mr. Lerner added the word "Wilfred." So the sign now reads, "Wilfred Lerner."

I may say that Mr. Lerner decided to keep the possessive form of "W. A. Lerner's" or "Wilfred Lerner's," but the plaintiff objected to that; although in my opinion the dropping of the possessive makes the name more nearly like "The Lerner Shops" because the possessive itself, I think, is a distinction. So the possessive was dropped for that reason and not for reasons of our own; and then the word "Wilfred" was added. So the name now used is, "Wilfred Lerner, apparel, home owned."

It is true the name "Wilfred" is not in the same size as the name "Lerner," but it is also true that the name "Wilfred" is so large as to be unmistakable.

In the case we cited in our memorandum, I believe the Horlick case, where it was claimed that the first name of the defendant should be in the same size as the second name, the surname. Those were products cases, and consequently, of course, the sign was maybe one-eighth of an inch high; and if the first name wasn't in the same size as the surname it wouldn't be there at all. But here we have a case where the surname is, say, three feet high and the first name is perhaps a foot and a half high, or in that general proportion, and it can be seen by anybody of reasonable visual perception that there is absolutely no chance for mistake or [17] confusion, and there has never been anything

done intentionally to pirate the business of the plaintiff.

On the contrary, the two are engaged in a slightly different type of business. Mr. Lerner caters to a higher class. I understand there are three types in this business, three classifications, one is called "low end," another is called, I believe, "popular priced," and the third is called "specialty." Our contention is Lerner's is sort of in between "low end" and "popular priced." "Higher priced" doesn't make it cater to large volume, and the specialty would include such stores as Magnin's; that is, I. Magnin and Joseph Magnin, who seem to get along together, who seem to get along without pirating each other, and they are in the same city and, I believe, in the same block. Those are called "specialty;" but I would have called them "exclusive." There is that type.

There is no contention and no possibility to contend that there is anything in the appearance of the stores, the appearance of the wrappings, that is similar, and Mr. Lerner believes it would be to his disadvantage to be taken for one of the Lerner chains, and does desire to do everything that is reasonable to avoid that confusion; but still reserving the sacred right to use his own name. I don't mean that in a derogatory sense to Lerners or derogatory to the merchandise, but just that the two things are different. But here you have a different classification and Mr. Lerner does not choose to [18] be in that classification.

The Court: We will take a five-minute recess.

Mr. Goldberg: I would like to make one statement for the record, and that is in connection with the statements about possible adjustments. All of these were negotiations and we never had, if your Honor please, at any time any authority from the plaintiff to adjust on any of the bases mentioned. So, I think so far as this record is concerned, it should appear that there was never any proposal on the part of the plaintiff to adjust, except in accordance with the principle of the complaint. There were discussions between counsel which didn't reach the point where they were authorized by the plaintiff.

The Court: Well, at least they were discussed in open court.

Mr. Goldberg: Yes.

The Court: There was a pre-trial conference, and as I remember it, there were photographs submitted to me, and the conference was continued from time to time to see whether or not the litigation couldn't be terminated by making some changes.

Mr. Goldberg: Your recollection is correct, your Honor, and it went this far, that we, representing the plaintiff, sought to obtain from the defendant certain adjustments which we had then submitted to the plaintiff, but we didn't obtain [19] it from the defendant. So we weren't able to submit it.

The Court: We will have a five-minute recess.

(Recess.)

The Court: You may proceed.

Mr. Goldberg: Mr. Magee, please.

## GRAHAM MAGEE,

called as a witness by the plaintiff; sworn.

The Clerk: Will you state your name to the Court?

A. Graham Magee.

## Direct Examination

By Mr. Goldberg:

Q. Mr. Magee, where do you reside?

A. In New York City.

Q. What is your occupation?

A. I am an official of the Lerner Stores Company.

Q. What is your position in the company?

A. Vice-president and assistant secretary.

Q. How long have you been with that company?

A. Since January, 1929.

Q. Where is that company incorporated?

A. In the state of Maryland.

Q. And qualified to do business in California?

A. Yes, it is.

Q. Are you familiar with a company known as the Lerner Shops of California, Incorporated?

A. Yes, I am.

Q. Do you know who is the owner of the stock of that company? [20]

A. The capital stock is owned by Lerner Stores Corporation, the plaintiff in this action.

Mr. Robinson: Pardon me, I didn't get the name of the California corporation.

Mr. Goldberg: Lerner Shops of California, Incorporated.

(Testimony of Graham Magee.)

Q. It is a wholly owned subsidiary of the plaintiff? A. That is correct.

Q. Does Lerner Shops of California, Incorporated, operate any places of business in California?

A. They operate all our stores in California.

Q. How many stores?

A. We are presently operating thirteen stores in the State of California.

Q. Are any of them in or about the San Francisco Bay Area?

A. Yes, we have two in San Francisco; one on Market Street and one on Grant Avenue.

Q. The one on Market Street is where? What is the number?

A. It is adjoining the Emporium.

Q. That would be between Fourth and Fifth Streets? A. That is correct.

Q. And the number is 871?

A. That is correct.

Q. How large a store is that? What is the frontage?

A. The frontage of it is eighty feet, and the depth of the store, approximately 258 feet.

Q. What floor area do you occupy?

A. We occupy the first floor and entire second floor of the building for selling, and [21] we use the basement for storerooms.

Q. Do you have any arrangement for using any additional space in that store?

A. We have leased the entire commercial build-

(Testimony of Graham Magee.)

ing; contemplate occupying the entire property at a subsequent date.

Q. What is the frontage of that property?

A. Eighty feet.

Q. And how many stories does it have?

A. It is a ten-story building.

Q. The remaining portion of the frontage is now occupied, is it? A. Yes, it is.

Q. By whom?

A. By Edison Shoe Stores and the entrance to the building.

Q. Can you tell us who originally—withdraw that. Let me ask you, first: What is the nature of the business that is done in these stores in the Bay Area?

A. We are in the retail business, selling women's wearing apparel, which consists of coats, suits, furs, underwear, hosiery, sportswear, millinery and bags.

Q. Did you say dresses? I don't recall.

A. Dresses.

Q. Is there any difference in what you carry in the various stores in the country?

A. It would vary only to the size of the store. In other words, it would be the same merchandise throughout the United States.

Q. What about the styles? Are they any different in the different parts of the country?

A. You would have different [22] colored merchandise in different sections of the country, but the styles are pretty much the same throughout the United States.

(Testimony of Graham Magee.)

Q. What about the prices?

A. The prices are uniform; in other words, we sell for the same price in San Francisco as we do in New York City.

Q. Is that true of chain stores generally?

A. It is not true generally, because only a few of chain stores have that policy.

Q. Where it is not true, what is the difference in prices?

A. As an illustration, Montgomery Ward would have an increase in price on a dress of seventy-five cents which would cover the additional shipping costs, which we absorb.

Q. With respect to the type of merchandise that you carry in each category, as to whether or not it is an up-to-date style, or what it is, can you tell us?

A. It is modern, up-to-date merchandise, popular priced.

Q. When you say "popular priced," you heard the statement counsel for the defendant made in his opening statement about low-end merchandise? Does plaintiff's stores carry low-end merchandise?

A. No, we do not.

Q. You would characterize it as popular priced.

A. That's right.

Q. With respect to the prices at which the same articles or comparable articles are sold in other stores, can you tell [23] us whether there is any difference in that and the Lerner's prices?

A. We undersell department stores, as an illus-

(Testimony of Graham Magee.)

tration, by one to two dollars per garment, when you are dealing with coats or dresses. In a similar way with other items or merchandise.

Q. Do you have any policy with respect of exchanges of merchandise among the stores.

A. A customer can buy a dress in San Francisco and exchange it in New York City and get money back, or change the size, or get a credit slip, which is good in any store in America that we operate.

Q. With respect to the locations of stores, taking the Bay Area, and then, also, your general policy, what is the policy with respect to the location within a community of your store?

A. We endeavor to locate our stores in what is known as a one hundred per cent location; that is, where there is the highest pedestrian traffic.

Q. Is that true with respect to your stores in the Bay Area? A. That's correct.

Q. Taking the store on Market Street, how does that rate so far as its retail store value is concerned?

A. It is the highest trafficked block in the city of San Francisco.

Q. Are there any other stores in that block?

A. You have the Emporium, and you temporarily have the Hale's Store in the old Penney location, and you have Grayson and Edison Shoe Store; Owl Drug, and the other end where Hale's is going [24] to be located you have a number of tenants.

(Testimony of Graham Magee.)

Q. Is Woolworth's in that block?

A. Yes, Woolworth's is in that block.

Q. With respect to your store, you have another store in San Francisco.

A. Yes, we have a store adjoining the White House on Grant Avenue.

Q. How long have you had these stores in San Francisco?

A. We opened the store on Grant Avenue in 1934; and we opened the store on Market Street in 1935.

Q. When did you open the Oakland Store?

A. I believe it was around the same date, 1934.

Q. In Oakland what sort of location do you have?

A. In Oakland we are at the corner of Twelfth and Washington. It is the highest trafficked corner in that city. We are on the Masonic Temple property.

Q. Are there any other national chain stores that have stores in that vicinity?

A. Oh, yes, most of the chain stores are located in close proximity. W. T. Grant Company and Edison Shoe Stores have stores there, too.

Q. Can you tell us where the other stores in California are?

A. Well, starting at San Diego, we come up to Los Angeles, and we have a number of stores immediately surrounding Los Angeles, such as Inglewood, Huntington Park, San Bernardino,

(Testimony of Graham Magee.)

Santa Barbara—Inglewood—I think I mentioned that before.

Q. Do you have anything that would refresh your recollection [25] as to where your stores are located?

A. Our annual report would indicate—

The Court: I don't suppose that is disputed. Why don't you read them.

Mr. Robinson: Read the dates when they were opened.

Mr. Goldberg: Q. If I haven't the dates, Mr. Magee, can you tell me the dates? Let us do this in alphabetical order? Take Bakersfield?

A. I have to approximate the date. I would say we opened at Bakersfield in 1943.

Q. Fresno? A. Fresno in 1944.

Q. Huntington Park? A. 1942.

Q. Inglewood? A. 1942.

Q. Long Beach?

A. Long Beach, we opened in, I would say, in 1931.

Q. Oakland, you have testified to?

A. Yes.

Q. Pasadena? A. Pasadena in 1930.

Q. San Bernardino? A. 1930.

Q. San Diego? A. 1930.

Q. And the San Francisco stores you have testified to? A. Yes.

Q. Stockton? Did I mention Santa Barbara?

A. Santa Barbara we opened in 1930.

Q. Stockton?

(Testimony of Graham Magee.)

A. Stockton we opened in 1940.

Q. Now, in addition to those thirteen stores in California, have you made any commitments for the opening of any additional stores in California?

A. We have fourteen locations which we [26] have already leased or purchased in the State of California for future stores.

Q. It might be helpful, perhaps, if I were to read this and have the witness determine whether those are the ones. I am reading from the annual report, and will you tell me if these are the additional locations: Beverly Hills, Burlingame——

A. Yes.

Q. Glendale? A. Yes.

Q. Hollywood? A. Yes.

Q. Los Angeles? A. Yes.

Q. Modesto? A. Yes.

Q. Palo Alto? A. Yes.

Q. Riverside? A. Yes.

Q. Sacramento? A. Yes.

Q. San Jose? A. Yes.

Q. San Mateo? A. Yes.

Q. Santa Monica? A. Yes.

Q. Vallejo?

A. Yes. I think we have subsequently taken Ventura.

Q. Oh, I see Ventura is here. I omitted to mention that.

Mr. Robinson: I think I should state that it should be understood that we object to the competency, relevancy, and materiality of this testi-

(Testimony of Graham Magee.)

mony as to future plans and future intentions in any other cities, particularly, in the city of San Jose.

Mr. Goldberg: I might say we have that testimony and [27] have offered it solely to support our contention and in line with the principle that we are an expanding organization and have definite plans for expansion, have expanded in the past and have definite plans in the future; and I believe it is relevant in that connection.

The Court: I will allow it and determine its weight when I decide the case.

Mr. Goldberg: Q. Mr. Magee, can you tell us who started this original Lerner business?

A. The business was started by Samuel A. Lerner in 1907.

Q. Where did he live immediately before that?

A. He had lived for a number of years in Oakland, California.

Q. What was his business at that time?

A. He was then a traveling salesman for the D. N. & E. Walter Company, a San Francisco carpet company.

The Court: Mr. Goldberg, I don't want to disturb the preparation of your case, but why do I have to hear all this preliminary history of the company? Isn't it most important that I know what the company does now?

Mr. Goldberg: I think it has this bearing, and I will be glad to make the statement, if the Court please: That I believe it should be in the record

(Testimony of Graham Magee.)

that this business was commenced by Samuel Lerner in 1907, and that he is still actively connected with the company.

The Court: You mean in connection with the use of the [28] name "Lerner"?

Mr. Goldberg: Yes, in connection with the name "Lerner" and to show that parties of that name are attached to that business.

The Court: All right.

Mr. Goldberg: Q. Is Mr. Lerner still connected with the business? A. Yes.

Q. In what capacity?

A. He is chairman of the board and vice president.

Q. Are there any other persons associated with him of his family?

A. Yes, J. J. Learner is president of the company, and Michael Lerner is vice-president and treasurer of the company. [29]

Q. How long have they been associated with the company?

A. I would say since 1919. Michael Lerner was a salesman for Samuel Lerner when they were in the manufacturing business.

Q. In other words, the older generation of Lerners.

Mr. Robinson: Now, just a minute: Do I understand this present business started in 1907, or that this is the successor of some previous business?

Mr. Goldberg: Q. What was the name of the company that was in business?

(Testimony of Graham Magee.)

A. Lerner Waist Company.

Mr. Robinson: Q. Was it a manufacturing company?

A. It was a manufacturing company.

Mr. Goldberg: Q. When did they first open stores? A. In 1919.

Q. In addition to the older generation of Lerners you mentioned, are there any sons?

Mr. Robinson: We still haven't the answer to the question I have asked.

Mr. Goldberg: I don't think we ought to have the examination interrupted.

The Court: No, I don't think so, either.

Mr. Robinson: I wanted to ask——

The Court: He said it was a manufacturing business and they didn't open stores until 1919. Go ahead, now, Mr. Goldberg.

Mr. Goldberg: Q. Mr. Magee, are there any other Lerners [30] in the same family that have been connected with the business?

A. They have two of Joseph Lerner's sons connected with the business who are now in the service. One is a German prisoner and one is in the United States. There is another son of Samuel Lerner who is a lieutenant in the Army Air Intelligence, who is connected with the business.

Q. He was in the business before he went in the service? A. That's right.

Q. In 1919 you say your stores were first opened. Can you tell us what company opened those stores?

(Testimony of Graham Magee.)

A. The corporation was known as "Lerner Blouse Corporation." It had acquired the assets and good will of the Lerner Waist Company, the manufacturing company.

Q. Did that Lerner Blouse Company continue under that name?

A. In 1925 the name was changed to Lerner Stores Corporation.

Q. When did the plaintiff corporation come into existence? A. It was formed in 1929.

Q. What assets did it have when it commenced business?

A. It acquired the capital stock of three of the Lerner companies that were then existing, the stock of which was owned by the individual Lerners. It acquired the capital stock of the individuals.

Q. Yes. Did that include the entire capital stock of the company known as Lerner Stores Corporation, which had been known as Lerner Blouse Corporation?

A. Yes, it did. There [31] were two corporations, one a New Jersey, and one a Delaware, known as the Lerner Store Corporation was acquired by the Lerner Stores, Maryland. Lerner Stores, Delaware, owned the stock of New Jersey.

Q. So that the present company, Lerner Stores Corporation, owns the stock of all the companies that have operated Lerner Stores and has acquired or has the stock of all companies that now operate Lerner Stores. A. Yes, that is true.

(Testimony of Graham Magee.)

Q. In connection with those acquisitions did it acquire the right to use the name "Lerner"?

A. Yes, it did.

Q. Can you tell us by what name the plaintiff's business and the business of its subsidiaries is known?

A. The trade name is known as "Lerner Shops."

Q. By trade name, you mean what?

A. The sign on the entrance to our store and on our windows and on our boxes.

Q. Yes; and by what name is it referred to by the persons doing business with the company?

A. Referred to as "Lerner's".

Q. Have you personally had experience to that effect? A. Yes, I have.

Q. Who is the person who is active in taking and acquiring leasehold interests for the company, real property for the company? A. I do.

Q. In that connection, do you have to travel through the country?

A. I travel all over the United States.

Q. How frequently do you travel?

A. I spend six months a year [32] on the road.

Q. In that six months' period do you contact people on behalf of the plaintiff and its subsidiaries? A. Yes, I do.

Q. And in those contacts what is the name by which you and the people you do business with refer to the company and its subsidiaries?

A. We always talk of "Lerner's."

(Testimony of Graham Magee.)

Q. Can you tell us very briefly the history of an establishment of these stores, as to when they started, and how they spread—just in a few words?

A. In 1919 there were six retail stores opened, and thereafter they opened a few a year. I would say that in 1920 they opened five stores; in 1922 they opened one store; in 1923 they opened four stores; in 1924 they opened twelve stores; in 1925 they opened nine stores; in 1926, fourteen stores; in 1927, twenty stores; 1928, twenty-seven stores; 1929, thirty-five stores. And it has continually grown since that time.

Q. There are how many stores now?

A. 181 stores.

Q. In how many States?

A. Forty-one States.

Q. You are an executive officer of the company?

A. Yes.

Q. And a member of the so-called management group of officers? A. Yes, sir.

Q. And have been for a number of years?

A. That is correct.

Q. Can you tell us whether or not it is the policy of the company, speaking of it as an executive, to continue to open new stores?

A. Yes, it is the policy. [33]

Q. What determines the place where the company will open new stores?

Mr. Robinson: This is, of course, subject to the same objection, your Honor, and I assume your Honor will make the same ruling.

The Court: Very well.

A. Using San Francisco as an illustration, we first opened in San Francisco to establish business here, and eventually opened in the surrounding areas to San Francisco. We did likewise in Los Angeles, and that is true of the other large cities.

Mr. Goldberg: Q. Is there some definite merchandising policy that is involved in that practice?

A. The reason you get into that practice is the matter of supervision of the stores. We have a district supervisor, and the district manager who supervises eight or ten States, and we group the stores for the purpose of economy in supervision.

Q. When you go into an area where you would have a store, where would you place your first store or stores?

A. We, of course, try to locate a business city where we know we will do a good business.

Q. With respect to the area surrounding that city, did you make any study to determine whether or not you are going to get any business from the surrounding area?

A. No; going into a city we first attempt to determine the amount of volume we can expect in that city; and in determining that volume you have to [34] know its trade area.

Q. What is the necessity for determining volume based on?

A. You have to determine volume in order to know what rent you can afford to pay.

Q. Then, in determining volume, what sort of study do you make?

(Testimony of Graham Magee.)

A. We take into consideration the trade area, the distances in the city, and its trade area, the bank deposits, and the other merchants that are presently located in the city.

Q. Did you participate in the original lease on Lerner Stores of this company in San Francisco?

A. Yes, I did.

Q. At that time what trading area did you take into consideration?

A. We took in the entire bay area as a trading area for San Francisco. I would say anywhere—we included in a trading area the city of a size of San Francisco, cities located within fifteen, twenty, thirty or forty, fifty or sixty miles from San Francisco, depending upon the ability of the shoppers and their means of transportation to get into a city of this size.

Q. Did you make any study as to the transportation facilities in the area into San Francisco?

A. Yes, we did.

Q. For instance, between San Francisco and San Jose, and the communities between San Francisco and San Jose, what did you determine there were, as to facilities?

A. As an illustration, they have what is known as a "Shoppers Train" that runs between San Francisco and San Jose, and that is true of most of these communities surrounding San Francisco.

Q. When you say a "Shoppers Train," what do you mean?

A. It is a train that leaves in the morning and

(Testimony of Graham Magee.)

a similar train that returns that afternoon to San Jose.

Q. Did you make any study as to whether or not it was patronized by women, for instance, who came in to town—

A. We determine the circulation of the newspapers, because that determines your buying public. After all, the buyer of a newspaper is a potential purchaser of merchandise in our store, and you determine where those newspapers are sold. In all of the cities within thirty, or forty, or fifty, or sixty miles of San Francisco, they read the morning and evening San Francisco papers, and that determines the fact that they are customers, because the department stores in San Francisco advertise for the purpose of bringing this type of customer to San Francisco. They become our potential customers.

Q. Do you know whether the San Francisco papers are sold on the streets in San Jose?

A. Yes, they are—newsstands.

Q. And with respect to your San Francisco stores, one is located next to the Emporium and one is located next to the White House.

A. That's right; they are large advertisers and being in close proximity to those stores it enables us to obtain potential customers.

Q. Your stores do a cash business, do they not?

A. Yes, entirely.

Q. So you don't have charge accounts or names of customers as — [36]

(Testimony of Graham Magee.)

A. No. The only way we would is if they had a credit slip, or a return slip.

Q. When you get a credit slip or a return slip from a customer, that slip carries the name and address of the customer?

A. Yes, and the copy goes to the New York office.

Q. And those copies that go to the New York office come to your attention, do they?

A. No, they go to the bookkeeping department. I have had occasion to see them from time to time.

Q. From those slips you can determine—

A. From those slips you can determine your trading area for your store. You can determine where your customers are coming from. It also enables us to determine in opening new stores whether or not we have a nucleus for a new proposed store.

Q. When did you first do any work on the lease for San Jose?

A. We started negotiations for that in 1941.

Q. At that time when you started those negotiations, did you determine whether or not you had a nucleus in San Jose?

A. Yes, we had been in business on Market Street in our large store since 1935, and we had built up a very substantial volume. The records that we would have there in the form of credit slips would indicate we had a great many customers in San Jose, and also other surrounding communities of San Francisco.

(Testimony of Graham Magee.)

Q. Is this practice that you testified to in opening in a large area, and then opening in the subsidiary areas, if you build up a nucleous there, is that a practice that is followed by other [37] chain store organizations? A. Yes, it is.

Q. And with regard to San Jose, have any other chain stores organizations opened there?

A. Oh, yes.

Q. What ones?

A. The variety stores are there, including J. C. Penney. Some of your local department stores, such as Hale's, have gone into that type of community. The shoe chains, such as Edison, have gone into San Jose—Zukor and Grayson, too.

Q. What line of business are the last two in?

A. Zukor and Grayson are in the same line of business we are.

Q. In that San Francisco store, or, rather, on the outside of it do you have a sign?

A. We have a sign, "Lerner Shops."

Q. How large is it?

A. It is a pretty large sign, because of the frontage. I would judge the sign must extend over an area of twenty feet. The letters, I should say, are three to four feet in size. They are lighted.

Q. They are lighted at night?

A. Yes, when permitted.

Q. Is that a sign visible to people in that vicinity?

A. It is visible for quite a distance on Market Street.

(Testimony of Graham Magee.)

Q. With respect to the way in which your company is known to the public, do you receive mail in your office in New York addressed to the company?

A. Yes, it is received and in a great many ways.

Q. How is it addressed?

A. It is addressed in a great many ways. A great many people address us as "Lerner Stores," "Lerner's," [38] "Lerner Bros."

Q. Do any address you as "Lerner Stores Corporation"?

A. I would say most of the business mail is addressed as "Lerner Stores Corporation," because that is our corporate name.

Q. Is there any other firm or business in this state, to you knowledge, engaged in ladies' wearing apparel business which does business under the name "Lerner's," or any part of the name, other than the defendant?

A. None that I know of, or ever heard of.

Q. What is the situation with respect to the West Coast States?

A. There are no stores on the West Coast by that name other than the defendant.

Q. With respect to size, how does the Lerner group of stores compare with those in the same line of business?

A. We did last year approximately eighty-seven million; and our nearest competitor would do approximately twenty million.

Q. Is that in this country?

(Testimony of Graham Magee.)

A. It is in this country; the nearest in England is twenty-three million.

Mr. Robinson: Q. Do you have stores in England?

A. No, I said the nearest competitor of ours in England would do twenty-three million.

Mr. Goldberg: Q. Your fiscal year ended January 31, 1945? A. That is correct.

Q. With respect to the lease in San Jose, without going into details can you tell us when the term commenced, and for what [39] period of time it is?

A. The lease was made for a term commencing July 1, 1942, and it extends for twenty years and eleven months.

Q. And where is the property covered by the lease?

A. It is located between Montgomery Ward and W. T. Grant.

Q. On what street?

A. On the main street. I don't recall the name there.

Q. Is that the same street on which the defendant has his store? A. Yes.

Q. Where is it with respect to defendant's store?

A. He is in the block down below us.

Q. Is it on the same side of the street?

A. It is on the same side of the street.

Q. What is the size of the property you have leased?

A. We have leased a store 35x137.

(Testimony of Graham Magee.)

Q. Why haven't you already occupied it?

A. Under the provisions of the lease we agreed to build a new building, and at the time of occupancy, proposed occupancy, under the lease there was a restriction, L-41, which prohibited an expenditure in excess of \$5000 for reconstruction.

Q. L-41 is a regulation of the War Production Board?      A. Yes.

Q. What have you done with the property?

A. We have continued the tenants. Moss Stores was there, and we continued them in occupancy. We had a vacancy in the other store and we were obligated to get a temporary tenant to occupy it.

Q. What is your rent obligation under that lease?

A. Part of the term \$100 a month; balance of the term \$1000 a month, against percentage on sales.

Q. Do you have any obligation under that lease to occupy the premises, yourself, or can you sublet it to others?

A. We have to occupy the major part of the premises, but we can sublet a small store, a ten-foot store.

Mr. Robinson: We object to that as calling for the opinion and conclusion of the witness, particularly under the present circumstances. It is a conclusion of law.

The Court: It hasn't anything to do with this

(Testimony of Graham Magee.)

case. I don't want to try that lease. You are not occupying that now?

A. No.

Q. As a matter of curiosity, how do you get by with that?

A. They can't do anything else, since the law won't permit us to build.

Q. You mean if they try to throw you out, you would say there is an impossibility of performance? A. That's right.

Mr. Goldberg: I am trying to shorten this matter. I have a twenty-seven page lease, here, which I am hesitating to offer.

The Court: I think you have covered all you want in that connection, haven't you?

Mr. Goldberg: But there is a provision in which the parties state the tenant cannot occupy the premises in its present condition. So the landlord, himself, recognized they couldn't [41] occupy the premises without reconstruction.

The Court: Then you are not bound to occupy them until the situation is changed so they may proceed to reconstruct, so as to occupy?

Mr. Robinson: And there is nothing in the lease that they have to open up under the name of "Lerner's" or "Lerner Shops."

Mr. Goldberg: I believe there is, and I will show that to you. I want to read a portion of it. It is not long, the part I have in mind, and we can draw our own conclusions as to what it means. I am reading from page 25 of the lease:

(Testimony of Graham Magee.)

"Lessee covenants and agrees that during the entire term of this lease it will operate and conduct its business in the portion of the demised premises other than the portion which Lessee may sublet pursuant to the provisions hereinabove contained, in accordance with the usual standards and practices of Lessee, employed in Lessee's other stores now being operated in the State of California, and that during the entire term hereof it will maintain and keep on the demised premises, for sale, a full and complete line of seasonable merchandise in conformity with its merchandising policies for this section of the State of California."

Q. I might ask Mr. Magee whether the portion of that which I have just read is from the original lease?

Mr. Robinson: Mr. Goldberg, I accept your statement. [42]

The Court: You need not bother with that.

Mr. Robinson: I don't mean by that that I am conceding the materiality of that.

The Court: I understand that.

Mr. Goldberg: Q. Mr. Magee, you referred to a new lease of your premises on Market Street in San Francisco, by which you took the entire building, and where your store is located?

A. That's right.

Q. When was that made?

A. That was completed this last summer, and we had been negotiating on it for some time.

Q. Do you recall with respect to the date of

(Testimony of Graham Magee.)

June 1, 1944, whether you completed your lease before or after that date?

A. I would say it was around that time.

Q. Were you here in California at the time?

A. I was here in California at the time, yes.

Q. At the time that was done had you heard of the opening of this store by the defendant in San Jose? A. No, I had not.

Q. Under the terms of that lease what was your obligation with respect of occupying the ground floor?

A. We were obligated to occupy the entire 80 feet.

Q. You have testified to having taken leases, or purchased property in various localities in California. Is it the practice of the company to take leases or purchase property for purposes other than to occupy them, itself? A. No, it is not. [43]

Q. What is the plan of the company with respect to occupying one of its stores, that is, in connection with the leases and property you referred to?

A. The practice, as soon as we take a lease, as soon as we can get possession, make the improvements and go into business and operate our regular type store.

Q. With respect to the type of lettering that is used in Lerner Stores throughout the stores, can you tell us what the practice of the company is?

A. The type of lettering has changed over a period of years. The original lettering was a script lettering. Then we changed to a block let-

(Testimony of Graham Magee.)

tering; and in 1929 we went to a modernistic type of lettering; and the last four or five years we have been using a script letter.

Mr. Robinson: May I suggest you give the locations where those things were and are in use?

Mr. Goldberg: Yes. I think in order, perhaps, to refresh the witness's recollection I would like to show him some photographs.

Mr. Robinson: You can speed it up any way you think advisable, Mr. Goldberg, and I will give you every co-operation. I haven't seen them before.

Mr. Goldberg: Q. Can you tell us, Mr. Magee, first, with reference to your stores in California, whether you have any stores in California where the name "Lerner Shops" is now in script letters?

A. Yes, we have a number of stores. [44]

Q. Can you tell us?

A. We have Huntington Park; we have Fresno, San Jose, Stockton—

Q. Are those stores in California that you mentioned newer stores, that is, recent stores?

A. We opened Huntington Park—

The Court: Let's not go over that again. How about stores around here in this bay area that you spoke of?

Mr. Goldberg: Q. The signs on the stores in San Francisco and in Oakland are in block lettering? A. That is correct.

The Court: Q. Have you any photographs of those?

A. We have San Francisco.

(Testimony of Graham Magee.)

Mr. Goldberg: We have a picture.

The Court: You might put that in the record.

Mr. Goldberg: That is part of the annual report containing a number of stores and one of the other San Francisco stores has block lettering.

The Court: Have you seen this, Mr. Robinson?

Mr. Robinson: I believe I saw it at the pre-trial conferences. We can do better than that for you. I didn't see this particular picture.

The Court: You mean you have a photograph of the San Francisco store?

Mr. Robinson: Yes, I think we had one here at the pre-trial conference.

The Court: Maybe counsel can agree that is a photograph and either side may use it then. [45]

Mr. Robinson: Q. Is this the same one, Mr. Goldberg?

Mr. Goldberg: Q. Mr. Magee, is this a picture of the front of the San Francisco store on Market Street? A. Yes, it is.

Q. I notice there are two types of lettering, one above the entrance and one immediately below that.

A. That is new lettering. The lettering on top was possibly placed there after the lettering—above the awning. It is block letter above the sign, and it is a small of—the name for the type lettering I don't just recall.

Mr. Goldberg: Shall I offer this?

Mr. Robinson: You may use it if you wish, Mr. Goldberg.

(Testimony of Graham Magee.)

Mr. Goldberg: I would like to offer this in evidence. This has two types of lettering.

The Court: That is the Market Street store, Mr. Goldberg?

Mr. Goldberg: Yes, your Honor.

The Court: Very well.

(Photograph was marked Plaintiff's Exhibit 1.)

Mr. Goldberg: At the same time I would like to offer in evidence in connection with the testimony just given the photographs of the fronts of other stories in California having script lettering on the signs as follows:

Mr. Robinson: Just a moment, Mr. Goldberg. By my silence I don't want to put myself in the position of having to remember something important, especially when we are going to have a recess. The pictures speak for themselves, and both [46] you and the witness refer to the lettering as script; and I do not agree with you it is script; but there is no use of you and Mr. Magee getting into a controversy over what the lettering is. The court can determine whether it is the same script as ours, or what.

Mr. Goldberg: It is not block lettering.

The Court: Suppose we take a recess at this time, and why don't you get the pictures arranged with Mr. Goldberg without any further ado during the recess. If you have a picture of the Oakland store, or the San Francisco store, I would like to

(Testimony of Graham Magee.)

have those, as well as the ones in other parts of California.

Mr. Robinson: We have Grant Avenue. We do not have Oakland, and we don't know anything about the stores in any other parts of the state.

Mr. Goldberg: We didn't take a picture of Oakland, not believing it was material, but we have no objection to any counsel has.

Mr. Robinson: We haven't any. But I don't know what kind of lettering you have over there, Mr. Goldberg.

The Witness: I would say it is block lettering.

Mr. Robinson: Q. Somewhat the same as Grant Avenue, San Francisco?

A. I would say about the same as Grant Avenue.

Mr. Robinson: I have Grant Avenue that we can use as [47] Grant Avenue and quasi Oakland.

The Court: Is that agreeable to you?

Mr. Goldberg: We are happy to offer it and stipulate that the sign on the outside of the Oakland store is in block letters, and I don't know if it is sufficiently similar to call it quasi Oakland.

The Court: That picture is Grant Avenue, San Francisco, the next exhibit.

(Photograph marked Plaintiff's Exhibit 2.)

Mr. Goldberg: Can't we mark all of them now?

Mr. Robinson: Might this be done during the recess?

The Court: Have you anything to identify the city?

Mr. Goldberg: Yes, every one has an identifica-

(Testimony of Graham Magee.)

tion on the front except one, and that has it on the back. All of them will be offered with the identification on front or in the back.

The Court: All of them are now being offered?

Mr. Goldberg: Yes. San Diego will be Exhibit 3.

(Photograph marked Plaintiff's Exhibit 3.)

Mr. Goldberg: Huntington Park will be No. 4.

(Photograph marked Plaintiff's Exhibit 4.)

Mr. Goldberg: Fresno will be No. 5.

(Photograph marked Plaintiff's Exhibit 5.)

Mr. Goldberg: Stockton will be No. 6.

(Photograph marked Plaintiff's Exhibit 6.)

Mr. Robinson: It is going in subject to our objection that they are all immaterial, and obviously because they are remote; and on the further ground they do not show script.

The Court: I think your objection goes to the weight of the testimony. I will overrule the objection.

The Court: We will recess until two o'clock this afternoon.

(A recess was taken until 2:00 o'clock p.m.)

Afternoon Session, April 26, 1945, 2:00 p.m.

The Court: Go ahead, Mr. Goldberg.

GRAHAM MAGEE,

recalled.

Direct Examination (Resumed)

Mr. Goldberg: Q. Mr. Magee, you have referred to the Grant Avenue store and the Oakland store: Can you tell us what the frontage is of the Grant Avenue Store?

A. Approximately twenty feet.

Q. What is the frontage of the Oakland store?

A. Approximately eighteen feet.

Mr. Robinson: Pardon, I didn't hear the Grant Avenue figure.

Mr. Goldberg: Twenty feet, and the Oakland store has eighteen feet.

Q. Mr. Magee, does the plaintiff have its shares of stock listed on an exchange?

A. Yes, the New York Stock Exchange.

Q. What shares are those?

A. The common shares.

Q. Do you know how many shares are outstanding?

A. We have now twelve hundred thousand shares.

Q. About how many stockholders of common stock do you have?

A. Twelve to fifteen hundred stockholders.

Q. You also have a preferred stock outstanding?

(Testimony of Graham Magee.)

A. We have a preferred stock outstanding, traded over the counter. [50]

Q. 32,000 shares?

A. Approximately 32,000 shares.

Q. Of a par value of \$100 each?

A. That's right.

Q. Has the plaintiff company placed a value on its books on its name or good will?

A. No, it hasn't.

Q. Does it have a value?

A. It has a substantial value.

Q. What would you say is its value?

A. I would say many millions of dollars.

Q. One question I forgot to ask you before; maybe the court takes judicial knowledge of this—I am not certain—but San Jose is on a main traveled highway, is it?

A. It is on a direct route south to Los Angeles.

Q. Pardon me?

A. Also on the northern route to San Francisco.

Q. And beyond San Francisco?

A. To the other cities—Portland and Seattle.

Q. And the store of the defendant, as well as the store which you have leased, are on the main street?

A. That's right; you would pass the store if you were going either north or south.

Q. Do the Lerner Stores of the plaintiff in various localities obtain any substantial amount of business from customers who have done business in other Lerner Stores?

(Testimony of Graham Magee.)

A. Yes, they do, and that is the nucleus of our business.

Q. Can you tell us whether the plaintiff in this case—let me withdraw that. In connection with that lease that we had here that we referred to this morning in San Jose, that lease runs to Lerner Shops of California, Incorporated, does it not? [51]

A. As the tenant. The lease is guaranteed by the plaintiff.

Q. The plaintiff in this action is guaranteeing the performance of the lease by the subsidiary company?

A. That's right; that is our standard practice.

Q. Can you tell us whether the plaintiff in this action has been damaged by the opening of the defendant's store in San Jose under the name "Lerner's"? A. Yes.

Q. In what way has it been damaged?

A. It has been damaged—customers who have traded in the store think they are trading in the Lerner Shops.

Mr. Robinson: Just a minute. Does the witness understand he is to give his own knowledge, or opinion?

The Court: Do you object to the question?

Mr. Robinson: I object to the question as incompetent, irrelevant, and immaterial, and calling for the opinion and conclusion of the witness.

The Court: I think the question as to whether they have been damaged is for the court to determine.

(Testimony of Graham Magee.)

Mr. Goldberg: That question was answered. The next question was how it was damaged, and that is a question of fact, at least what happened that did damage the plaintiff.

The Court: I don't think that would help the court to have the witness state if they were damaged.

Mr. Goldberg: That is what we were coming to. That was preliminary. That was answered without objection, but the objection [52] seems to be to the second question: How was the plaintiff damaged?

The Court: I think the question is objectionable and I will sustain the objection. You can ask him if he can give any facts with respect to the opening of this store.

Mr. Goldberg: I am asking him this:

Q. In what way, if any, has the plaintiff been affected by the opening of defendant's store in San Jose?

A. The customers have bought merchandise in defendant's store.

Q. Whose customers?

A. The Lerner of San Francisco customers have bought merchandise in defendant's store, and in visiting the plaintiff's store, asked, wasn't that our store in San Jose, that they bought merchandise in there. It wasn't up to the same quality of merchandise that they bought in the Lerner Store in San Francisco.

Mr. Robinson: Just a minute. Are you finished? I move to strike the answer on the ground the witness is obviously giving his conclusion and not stat-

(Testimony of Graham Magee.)

ing the facts. If he is prepared to say he knows things of his own knowledge, then he is responding to the question as indicated by the court. The witness is stating a general conclusion.

The Court: Where did you get the information upon which you based your last answer?

A. The customers who come in the store.

Q. I mean, where did you get the information?

A. While I was in [53] the store. I visit these stores quite frequently.

The Court: What some customer told you?

A. The sales girl called my attention to it while I was there.

Mr. Goldberg: I am prepared to show, your Honor, that that is not hearsay, that proof of confusion in this type of thing is not hearsay, but, if anything, is considered an exception to the hearsay rule, and as courts have said, is the only way in which that type of thing can be proved, is by the customer's reactions.

The Court: The salesgirl might testify to that. But what the salesgirl told the witness would not be an exception to the hearsay rule.

Mr. Goldberg: I intend to have the sales people here to testify to that, and I am perfectly willing that that testimony be permitted subject to a motion to strike it out if it is not testified to by the sales people, because this is only—

The Court: I will say to you, Mr. Goldberg, that I won't pay very much attention to that kind of testimony.

(Testimony of Graham Magee.)

Mr. Goldberg: What is that, your Honr?

The Court: The testimony that somebody says a person came into the store and made that statement. There is no way for the other side to cross-examine on that type of testimony.

Mr. Goldberg: We are satisfied as a matter of law the courts recognize that is the only way a complaining party could prove that sort of fact. [54]

The Court: I have tried other cases of this type in which the parties themselves have been brought into the court to testify, so there would be an opportunity to cross-examine them. If that is the essential part of the case, the resources of the company should be such that they can bring in those people. You can produce that evidence, but I wouldn't be prepared to make a finding on such evidence as that.

Mr. Goldberg: It is not hearsay. It is admissible evidence.

The Court: Let me ask you: If you were a judge, would you issue an injunction solely on the testimony of the plaintiff, himself, who says that someone told him that he came there by mistake, without more direct evidence?

Mr. Goldberg: I would say this: If I had three stores in this San Francisco Bay area and several of the people working for me in each of those stores came in and testified in court that they have customers, people they know who are from San Jose, although they don't know them by name, but they come in and tell them that they bought something

(Testimony of Graham Magee.)

in our San Jose store and were told that we do not have a store in San Jose, and these people insist we did have a store in San Jose because of the name. I think that is permissible, and it is persuasive, especially if it has happened on a number of occasions. I think it places on the plaintiff an impossible burden, to say we should be in a position to produce those people to testify on matters which have occurred in various stores, and weren't called to our [55] attention, that is, to the attention of the proprietor, you might say, or the management, until a long time afterward, because the sales people didn't believe, or pay enough attention to it. Some of them didn't even know. Some of them thought we did have a store in San Jose when they were questioned about it. So it seems to me the plaintiff is producing about the only kind of testimony in the ordinary course he could get on the subject; and if he produced more than one isolated occasion, it has weight. It isn't the only testimony we have. We have in the record proof of the fact we have San Jose customers.

The Court: Of course, the question we have is that you are now asking the witness on the stand to tell you what his sales girl told him, and I think that is far-fetched.

Mr. Goldberg: I don't have in mind we are proving the fact by his testimony; but we are proving the damage suffered by the plaintiff based upon those facts, which cannot be disregarded.

(Testimony of Graham Magee.)

Mr. Robinson: It is not the pending question. I might say—

The Court: The question to which our attention has been directed is a question that apparently calls for some statement to this witness by some sales people.

Mr. Goldberg: I think the pending motion is to strike the answer as a conclusion, and counsel called it a conclusion, because it is claimed it is based on hearsay. I don't think it [56] is a conclusion at all, if the fact is admitted, and the fact, I am satisfied, is admissible, even though we might have to take this witness off the stand and put the sales people on and put him back.

The Court: I don't know why you ask this witness about that.

Mr. Goldberg: I didn't make myself clear. I didn't ask him if he lost customers. I am asking him what is the effect on the plaintiff's business of the opening of the store by the defendant in San Jose, and he is giving his answer.

The Court: I am sorry to say, I don't need a witness to tell me that. If the facts show me that to be the case, that is a conclusion I could draw.

Mr. Goldberg: Our point is simply this—

The Court: I want to save time. Let him answer. I have already indicated how much weight the court will attach to that.

Mr. Goldberg: I think we are putting the emphasis on something different. I am not trying to prove by this witness the fact that we lost business,

(Testimony of Graham Magee.)

because I can prove that by the people who had the direct contacts; but assuming that because he was taking that as a basis for his answer, the question is in order; was the company affected by it? My point is this, that in this witness' testimony it is shown that we are not effected merely by the loss of the particular sales, but by the fact that customers of ours who are accustomed to doing business with us [57] and getting our type of merchandise, with our policy and treatment have done business in another place having a different policy, thinking it was ours; somewhat different merchandise, as far as styles go, and at a somewhat higher price for what we say is comparable merchandise. Therefore, our reputation and our good will have been damaged with respect to those customers, and perhaps with respect to many others from whom we haven't heard.

The Court: I can understand that, and I thoroughly appreciate the point you are making; but the witness' conclusion as to that is no more different than any conclusion the court might draw. You must present facts as to the nature of the business that these defendants did.

Mr. Goldberg: True.

The Court: And then the comparison will follow from that. If you are able to show that some customers were misled by that, all right, but I don't think that the witness' conclusion proves anything. You have to have some facts upon which to base that. I understand what you are driving at. It is

(Testimony of Graham Magee.)

very clear, but I don't think it proves anything for us to ask the secretary of the company to draw a conclusion that is very obvious. You must have facts rather than just a statement of the officer of the company.

Mr. Goldberg: I think this——

The Court: Yes. [58]

Mr. Goldberg: Aside from the conclusions which would follow obviously, which are that you have lost business if somebody has bought from someone else the value of the name of the company and its method of doing business is perhaps a little more emphasized in the case of the plaintiff than might be usual, because it has built up its business on its name and its method of doing business. Therefore, anything that happens, that makes people doubt the value of it is more detrimental to this company than a company who hasn't had that policy. That is what I am concerned with this witness, who has been with the company for years.

The Court: Go ahead with the examination if there are some factual matters you want to bring out. What you have just stated is more in the nature of argument.

Mr. Goldberg: What I stated is, your Honor.

Q. You testified this morning that customers who buy in one of the Lerner Stores have the privilege of exchanging that merchandise in any other store in the country that Lerner has. Is that a practice that is taken advantage of by customers?

A. They do it quite often, because many times a

(Testimony of Graham Magee.)

customer might be in Santa Barbara, buy merchandise in Santa Barbara, and when she gets back to her home in one of the other cities she wants to exchange it, because she had the wrong size, or didn't have the right color. As a matter of fact, it is quite prevalent throughout our stores throughout the country. That is the reason we made it a policy. [59]

The Court: If that is the case, Mr. Goldberg, then if somebody dealt with this store in San Jose, thinking it was your store, then it would be true, would it not, that no one practically any place in the United States reasonably close to any community in which you state you have a store, could have a store under the name of "Lerner's?"

A. Where the confusion arises——

The Court: Wouldn't that be so?

A. A customer buys a dress in the Lerner Shops and goes into San Jose and sees a shop by the name of "Lerner's", and she thinks she is dealing with the Lerner Company.

The Court: That would be true of any town in the United States where there were a number of communities a few miles apart.

A. That is the reason we are——

The Court: You have answered my question.

Mr. Goldberg: Q. Does the plaintiff or its various subsidiaries advertise their business?

A. They don't advertise it in the newspapers, but they do in other forms.

Q. In what other forms?

(Testimony of Graham Magee.)

A. We consider these types of stores we erect in these communities advertising. We consider the way we display our merchandise, our backgrounds in the windows, as advertising.

Mr. Robinson: I move to strike that. It is obviously all the same tenor. I think the witness ought to answer Mr. Goldberg's question, do you or do you not advertise, and tell us [60] what they do. He is testifying to what he considers advertising. It is for the Court to decide whether a certain type of store is advertising.

A. We do advertise in the following forms: We spend an average of \$10,000 for the erection of a store front which is to a great extent a sign. We call it a billboard sign, indicating the location of the Lerner Shops. We expend a considerable amount of money for the window background and the fixtures in these windows, and display the merchandise in the windows. All merchandise in the windows is ticketed with the name "Lerner Shops," and with the price, which isn't the customary practice in a great many stores. We spend considerable money in the lay-out of the store, which is advertising.

Mr. Robinson: I move to strike the last part of the answer beginning with "We spend considerable money."

The Court: That may go out.

Mr. Goldberg: The part which is advertising.

Q. About how many transactions did you have

(Testimony of Graham Magee.)

last year, sales to the public, that is, your fiscal year?

A. Approximately thirty million individual sales.

Mr. Robinson: Mr. Goldberg, are you bringing in the nation-wide figures, also, to show we are damaging your New York, Chicago and New Orleans stores? From your position here, I don't know the limits embraced, if there are any limits.

Mr. Goldberg: We have one name and one good will, and if [61] you have damaged it you damaged it wherever it is and whatever it is. We do business all over the country, and those people can be doing business with us in San Francisco or San Jose even though they live in New York.

The Court: Gentlemen, can't we move a little faster? I don't think there is any dispute between you that this is a big firm and does a large business. Can't we get down to the specific matters that give rise to the litigation?

Mr. Goldberg: I have to prove that by the defendant, himself, which I propose to do, but I want first to prove our case. It is not denied; in fact, it is claimed that the defendant opened the store and engages in the sale of women's wearing apparel in San Jose. We start with that foundation. The particulars will be developed from photographs and from Mr. Wilfred Lerner's own testimony.

The Court: All I am suggesting, Mr. Goldberg, is that I think it has been sufficiently developed

(Testimony of Graham Magee.)

from what you have brought out and by your opponent's statements that this is a very large concern and has a large number of stores in the kind of business it does. Unless you have some particular matter that you think should go in the record that has not been covered up, why can't we dispense with this line?

Mr. Goldberg: The purpose of these questions this afternoon is to direct the Court's attention to the fact that this company is damaged by the use of a name in the manner of the defendant, [62] not merely on a showing of how many sales it lost, but anything which might make the customers or prospective customers think they are buying Lerner's merchandise.

The Court: I understand your contentions exactly, but it seems to the court that it all comes down to what the defendant did that brought about any of these situations that you speak of that are damaging to your client. That is the whole question.

Mr. Goldberg: Oh, if the Court please, there is a certain amount of it that is not in dispute.

The Court: I thought we went over all this in the pretrial conference, although we didn't have a pre-trial order. It seems to me these facts the witness is testifying to are not disputable matters.

Mr. Robinson: We are not trying to put Lerner's out of business, and we are not claiming we have the right to put them out of business. They have certain rights and we have certain rights.

(Testimony of Graham Magee.)

The Court: Let us get on. I can see there can be no limit as to the field of inquiry as to the way the plaintiff conducts its business.

Mr. Goldberg: The plaintiff has the burden of proof, and what the defendant may have in his mind isn't going to assist the plaintiff to establish its case. The defendant has not assisted in his answer. He wouldn't even admit the plaintiff [63] was a Delaware corporation, or anything. We have to make certain proofs that haven't been admitted in the answer.

The Court: Weren't there stipulations made at the pretrial conference?

Mr. Goldberg: We have a transcript of it, but there are no stipulations.

Mr. Robinson: The allegation that the plaintiff is a Delaware corporation, to my recollection, is not denied.

Mr. Goldberg: Maryland.

Mr. Robinson: It is denied that the plaintiff has been continuously in business for twenty-eight years as alleged in the complaint, and it is denied that it is entitled to this name for various other reasons which are elaborated in the answer. I won't go into that now, but I don't want the court to understand we were captious and denied the plaintiff's corporate existence.

The Court: We are going far afield. Make your proof and go ahead.

(Testimony of Graham Magee.)

Mr. Goldberg: As far as this witness is concerned, I have proved that.

Mr. Robinson: Well, will Mr. Magee be here throughout the trial?

Mr. Goldberg: Yes.

Mr. Robinson: You are finished with Mr. Magee?

Mr. Goldberg: Yes. [64]

The Court: If you feel that you have other matters necessary to your case, bring them out.

Mr. Goldberg: No, your Honor.

The Court: I feel, as a matter of record, that we have made a record of these matters at the pre-trial conference.

Mr. Goldberg: I have read the transcript, and there was a good deal of discussion on both sides, but we never got down to stipulating to anything. There didn't seem to be much dispute about a lot of things, but they aren't part of the record as facts.

The Court: The reason I seem to be a little impatient with much of the details is that we have spent several hours on this matter, and it seemed to me the issue got down to the question of whether the designation of this defendant's store was sufficient to show that people were not misled, assuming that was your territory, as to whether those people were sufficiently misled to believe they were going in the plaintiff's store; and it seemed to me

(Testimony of Graham Magee.)

the purpose of the pre-trial conference was when we got to the trial we could get right at the issues.

Mr. Goldberg: Actually, it didn't get to that stage, because at the conclusion of the statements of facts back and forth it appeared there might be a means of adjusting this, and it was discussed, and it was wound up in that way and we didn't get to any stipulating as to facts.

The Court: All right, go ahead with the cross-examination. [65]

Mr. Robinson: Yes, your Honor.

#### Cross Examination

By Mr. Robinson:

Q. Do I understand, by going into the matters concerning which I made an objection and the objection was not sustained, I am not thereby waiving the original objection? I do not want to examine Mr. Magee on some things I don't think are material, but in view of the fact that they were gone into on direct examination I must go into that to clarify the situation.

Q. Mr. Magee, I understand the plaintiff corporation is a Maryland corporation? A. Yes.

Q. Incorporated in 1929? A. Yes, sir.

Q. And in 1929 did it take over the business of the predecessor corporations?

A. No, sir; it took over the capital stock.

Q. It took over the capital stock?

(Testimony of Graham Magee.)

A. Correct.

Q. What year was that? A. 1929.

Q. And the capital stock of what corporations?

A. Lerner Stores Corporation, Delaware corporation.

Q. That is, the Maryland corporation took over the stock of Lerner Stores Corporation, Delaware corporation? A. Yes.

Q. How long had the Delaware corporation been in existence? A. It was formed in 1920.

Q. It was formed in 1920? A. Yes.

Q. That was a chain store, is that right?

A. It was organized [66] for that purpose.

Q. Pardon me?

A. It was organized for that purpose.

Q. The Delaware corporation, the original Delaware corporation, which was organized in 1920, in turn took over the Lerner Blouse Company, is that right?

A. The first corporation—the series of events was, Lerner Waist Company, formed in 1907, which was in the manufacturing business. The assets of the Lerner Waist Company were taken over by the Lerner Blouse Company, a New Jersey corporation.

Q. When was that? A. 1919.

Q. The second Lerner Company was a manufacturing company, also?

A. That was retail. They had the right to manufacture, and as a matter of fact they did manufacture.

(Testimony of Graham Magee.)

Q. And then you got into the retail business under the name of Lerner Blouse Company?

A. Yes, they continued manufacturing and retailing at the same time—not manufacturing for the public. In 1920, the Lerner Stores Corporation, Delaware corporation, was formed, and it acquired the capital stock of New Jersey. They were both known as Lerner Blouse Corporation, and subsequently changed the name to Lerner Stores Corporation. You had two corporations.

Q. The original Lerner Blouse Company was the New Jersey corporation?

A. And the subsequent Lerner Blouse was the Delaware corporation.

Q. And in 1920 they took over the capital stock of Lerner Stores [67] of New Jersey. Now, what became of the Lerner Stores of New Jersey?

Mr. Goldberg: I think you are confused.

A. The Lerner Blouse Corporation was organized in 1919. In 1920 the Lerner Blouse of Delaware was organized; so you had two corporations. In 1925 both corporations changed their name from Lerner Blouse to Lerner Stores Corporation. The stock of the New Jersey, or Lerner Stores of New Jersey, was owned by Lerner Stores of Delaware. In 1929 the stock that was held by the individual Lerners and Mr. Lane in the Lerner of Delaware was purchased by Lerner Stores of Maryland and sold to the public.

Q. At that point you have three corporations;

(Testimony of Graham Magee.)

you have New Jersey, owned by Delaware, which is in turn owned by Maryland, is that right?

A. That's correct.

Q. Do those three corporations still exist?

A. No, sir.

Q. What happened to New Jersey?

A. New Jersey and Delaware both were discharged in bankruptcy.

Q. When? A. In 1932.

Q. Did New Jersey or Delaware do business in California? A. Delaware did.

Q. Delaware did in California, is that right?

A. That is correct.

Q. And the assets of Delaware were acquired by Lerner of Maryland? A. No, sir. [68]

Q. What happened to the assets of Delaware?

A. The assets of Delaware that were in the State of California were acquired by the Lerner Shops of California.

Q. I see. That is the point I wanted. In 1932 Lerner of Delaware, a subsidiary of Lerner of Maryland, was doing business in California?

A. That's right.

Q. That was the only Lerner doing business in California?

A. Lerner Stores of Maryland was qualified to do business.

Q. But the one actually doing business was—

A. The one actually doing business was Lerner's of Delaware.

(Testimony of Graham Magee.)

Q. Lerner's of Delaware in 1932 went into bankruptcy.

A. No, it sold its assets prior to bankruptcy.

Q. Are you sure of that?

A. Yes, sir; I handled it.

Q. It sold its assets to whom?

A. Lerner Stores of California, Delaware corporation, domesticated in the State of California.

Q. In 1932 Lerner of California was incorporated for that purpose? A. Correct.

Q. To take over the assets, the California assets of Lerner of Delaware? A. That's correct.

Q. And it did take over the assets?

A. That's right.

Q. At what value, do you recall?

A. They took over the assets, the book value on the inventory at book value, and they issued stock for the book value of furniture, fixtures, improvements and good will.

Q. And good will was down to one dollar?

A. That's right. [69]

Q. And good will, which you say is worth millions, you acquired at one dollar?

A. We have always listed good will at one dollar.

Q. Just prior to the time of Lerner Stores of Delaware going into bankruptcy, what corporate incident occurred that you recall?

A. I don't understand the question.

Mr. Goldberg: You can lead him.

(Testimony of Graham Magee.)

Mr. Robinson: Q. Lerner Stores, as such, never went into bankruptcy?

A. No, it sold its assets prior to that point.

Q. Let me refresh your recollection.

A. Yes.

Q. Do you remember being at 1060 Mills Tower in 1932 or 1933? A. I might remember.

Q. Do you remember the late Judge Marcel Cerf? A. Yes, sir.

Q. Do you remember telegrams you sent to our office telling us if we didn't let you off of your Sacramento lease you were going into bankruptcy?

A. We never did. The corporation never went into bankruptcy.

Q. Isn't it a fact that before going into bankruptcy, and for the purpose of concealing from the public that Lerner Stores of Delaware did business in California at that time, not in San Francisco, but in Sacramento—

A. That's right—no, that is not true, counsel, because the Lerner Stores of Maryland had the lease in Sacramento. Lerner of Delaware had no lease in the State of California.

Q. I understood you to say that it was Delaware that did business in California.

A. But it didn't have any lease in California.

Q. Well, you did business?

A. Delaware was operating the business, but it didn't have the lease in California.

Q. The Maryland was the leasehold corporation?

A. It was the parent corporation, and held the

(Testimony of Graham Magee.)

lease in the City of Sacramento, and it didn't go into bankruptcy.

Q. Maybe you can straighten me out on this, Mr. Magee: You were closer to the picture than I was. Isn't it a fact that before going into bankruptcy the name of the corporation which did go into bankruptcy was changed to the Realty Corporation of America?

A. Lerner Stores of Delaware changed its name to Outfitters Operating Realty Company, that is correct.

Q. And that is the corporation that had the lease, is it?

A. No, it didn't have the lease in the State of California. It held no leases in the State of California.

Q. That is the Delaware Corporation?

A. Yes.

Q. But it was the one operating in California?

A. All of the stores we were then operating in the State of California.

Q. You said when Lerner Stores of California took over the assets of Outfitters Operating Realty Company—

A. They took over the assets of Lerner Stores Corporation of Delaware.

Q. That's right. It did not take over the name. Naturally, that name went out of existence.

A. No, no, the sale of assets was made prior to bankruptcy.

Q. Was it made prior to the change of name?

(Testimony of Graham Magee.)

A. Yes. [71]

Q. Are you sure? A. Positive.

Q. You are also sure it never went into bankruptcy?

A. It never went into bankruptcy after it changed its name.

Mr. Goldberg: Q. You didn't say the Maryland corporation, did you?

A. The Maryland corporation had never been in bankruptcy.

The Court: This is all very interesting, gentlemen, but what has this to do with the case here? Why can't we move along?

Mr. Robinson: The point on this, your Honor, is the pleading states a continuous use of the name for twenty-eight years and we will show, and I think it is material—

The Court: Suppose it is only a few years; what difference does it make?

Mr. Goldberg: This doesn't tend to disprove it.

Mr. Robinson: Q. Mr. Magee, ever since 1932 the business in California has been conducted by Lerner Stores?

A. Lerner Shops of California.

Q. Lerner Shops of California, is that right?

A. That's correct.

Q. And that is a separate corporation?

A. That's right.

Q. With its capital stock—

A. All of it owned by Lerner Stores of Maryland.

(Testimony of Graham Magee.)

Q. Do you know who the plaintiff is in this case? A. Maryland.

Q. Lerner Stores of Maryland?

A. Lerner Stores of Maryland. [72]

Q. You maintain separate corporate entities, do you not, in all your transactions?

Mr. Goldberg: I didn't hear that.

The Court: Read the question.

(Question read.)

A. Yes, we do.

Mr. Robinson: Q. As a matter of fact, your San Jose lease is made with the California corporation, is that right?

A. And guaranteed by Lerner Stores Corporation.

Q. And guaranteed by Lerner Stores Corporation? A. Sure.

Q. Is that right? A. That is right.

Q. I understood you to say that in your various stores, including San Francisco, you sell the following items: coats, suits, millinery, bags, underwear, hosiery, dresses, and I believe you said furs?

A. Furs, fur coats, bags.

Q. You sell complete fur coats, or just fur-trimmed coats? A. Complete fur coats.

Q. Complete fur coats?

A. Complete fur coats, sportswear, slacks, sweatshirts—everything a woman wears, except shoes.

Q. Now, Mr. Magee, you heard the terms "Low end," "Popular priced," and "Specialty" used this morning, did you not? A. Yes, sir.

(Testimony of Graham Magee.)

Q. Do you consider your handle "Low end?"

A. No, sir.

Q. Is there anybody in San Francisco in your line, a similar shop, except in job lots, or things like that, that undersells you? [73]

A. Maybe Weinstein does.

Q. You don't know that, do you?

A. His type of business is what we call "Low end underselling."

Q. You don't know whether Weinstein, except for job lots or fire sales, undersells you?

A. There are very few companies in America underselling us.

Q. There are very few companies in America underselling you, is that right?

A. That's right; we sell the same merchandise they sell at a cheaper price than they sell it.

Q. You undersell department stores?

A. Yes, sir.

Q. And you undersell anybody else and you admit there may be a few exceptions, but in San Francisco you don't know how many?

A. The only one I know would be Weinstein. He operates on a lower market than we do.

Q. You don't know that to be the fact?

A. I don't know that to be the fact on some of his merchandise.

Q. Isn't it a fact that Weinstein sells slightly higher than you do, except when he has a fire sale or a clearance?

A. That isn't my understanding of his business.

(Testimony of Graham Magee.)

Q. That isn't your understanding of his business?

A. I have never seen his books; so I don't know what his mark-up is.

Q. You don't have charge accounts, either, do you? A. No, sir.

Q. You have told us that you always locate in 100 per cent locations? A. That is correct.

Q. How do you define a 100 per cent location?

A. You define it [74] as a location on which the heaviest pedestrian traffic circulates.

Q. And that is determined, is it not, by a traffic count? A. No, observation.

Q. Isn't that one form of—

A. I never take a traffic count.

Q. In other words, whether you do—

A. No one for us takes a traffic count.

Q. How do you determine in your way what I would do by traffic count?

A. We study the streets, we study the community, we study the other businesses.

Q. And you determine the number of people passing the corner? A. Yes.

Q. So you would do by ordinary observation what somebody else would do by traffic count?

A. A few people use the traffic count. The variety stores do; but as a general rule, it is not used.

Q. But we understand each other; by a 100 per cent location you mean a place where the greatest amount of pedestrian traffic passes?

A. On business sections.

(Testimony of Graham Magee.)

Q. On the block? A. On the block.

Q. In other words, the definition of 100 per cent location is that group of lots or locations or places of business in a city which commands the highest rent, and all other locations are graded from that, 90, 80 or 70 per cent?

A. That may be true; it all depends on the fellow who negotiates the lease, whether he pays higher or lower. [75]

Q. Of course, you also take into consideration the fact that you are near department stores and other large establishments that advertise and are responsible to some extent for that location being a 100 per cent location?

A. I would say we stay closer to variety stores than we do to department stores. In other words a department store might be on an 80 per cent location, but we depend upon, to a great extent, traffic on the variety stores.

Q. I understood you to say this morning that you choose locations near department stores because the department stores advertise in newspapers and brought trade in, and that trade therefore is attracted and becomes your potential customers.

A. They come down town, or come from San Jose to San Francisco as a result of department store advertising, and when they get to San Francisco they see the Lerner shops and come in and buy.

Q. You, yourself, don't advertise in newspapers? A. We do not.

(Testimony of Graham Magee.)

Q. While we are on the subject of advertising, you said the only kind of advertising you did was to build store fronts.

A. That is our form of advertising.

Q. There is only a general uniformity in your store fronts, isn't there—or there is no uniformity, is there?

A. The style of architecture changes over a period of years, so we have to take our stores as a whole. You will find in various periods of our history the type of architecture on the interior and outside front is different. You get modern ideas [76] and change your store fronts. We now have a pretty well standard front, but it may change in five years from now.

Q. But these pictures are current pictures (indicating) ?

A. Well, the Stockton store was built a considerable time ago.

Q. This picture is dated October 15, 1943.

A. I know; but we opened a store about 1940.

Q. But they are pictures of current conditions ?

A. They exist today.

Q. They exist today, and as of the day the defendant opened his store last June ?

A. That is correct.

Q. What I meant by uniformity was you don't maintain uniformity in fronts, like Woolworth, that paints the front in red and with gilded letters, and they have identical fronts ?

(Testimony of Graham Magee.)

A. Everyone pretty well knows the Lerner Shops.

Q. Answer my question.

A. We have a uniformity, yes.

Q. What does your uniformity consist of?

A. The type of lettering and color of the front.

Q. What is the color? A. Usually white.

Q. Your front is usually white?

A. White marble or white billboard signs.

Q. What color lettering do you use on your front? A. Lately we have been using red.

Q. The lettering is red? A. Yes.

Q. So, then, there is this uniformity to this extent, that you have a white background with red lettering? A. That's right. [77]

Q. And you have, usually, the word "Lerner Shops," is that right?

A. That's right; that is our trade name.

Q. The word "Lerner Shops" is not always on the same line, is it?

A. No, it depends upon the width of the store front.

Q. Sometimes it is like this (indicating)?

A. I would say 90 per cent of the time it is on one line.

Q. Sometimes it is in a heavy block letter like Market Street?

A. Our lettering in the last four or five years has been script.

Q. What you call script. This thing you said you

(Testimony of Graham Magee.)

didn't know exactly what it was; but it is not connected or written script like a man writes his name?

A. No, but this is a script lettering.

Mr. Goldberg: What store is that?

A. Stockton.

Mr. Robinson: Q. The Lerner Shop on Market Street is a heavy block sort of modernistic design? A. Not always.

Q. I say on Market Street.

A. On Market Street, yes.

Q. And Grant Avenue, the very same city of San Francisco, is considerably different. It has a light-bodied block, and there you have "Lerner Shops" on the same line with an underlining effect.

A. That is the thing that holds the lettering, that you see there, an awning box.

Q. When was Fresno opened?

A. It was opened about October of this year.

Mr. Robinson: Do you mind if I write under the word "Fresno" on the back of this picture, October, 1944, for future [78] reference?

Mr. Goldberg: That will be all right.

Mr. Robinson: Q. Of course, that was considerably after defendant opened his store in San Jose? A. That's right.

Q. And that has a special kind of lettering?

A. Script lettering.

Q. With a sort of attenuated "L" and an attenuated "S"?

A. It is due to physical conditions. It is script

(Testimony of Graham Magee.)

lettering, but it varies because of the physical condition. By that I mean, the facade of the building.

Q. But that long "S" and long "L" are not common to your other signs; you just use it on that one? A. That's correct.

Q. There was room to use that same kind of lettering, if you so desired, in your San Diego Shop?

A. Architecturally, it wouldn't have lent itself to that.

Q. Your lettering and sign is determined by the architect of a particular building, and the space requirements and space available?

A. 99 per cent of our lettering is the same as San Diego.

Q. I am talking about California.

A. As I say, San Diego and these other stores that have opened in California—

Q. You didn't answer my question. I said the type of lettering is determined by the requirements of the architect and the store and the space available?

A. As a matter of fact, there was a different architecture used in Fresno than was used in the [79] other stores in California.

Q. And you left it to the architect?

A. Yes, that's right, that particular one. Ordinarily, we design the signs, ourselves, in New York.

Q. But you still didn't answer my question. The design is determined by the space available and the general style of architecture?

(Testimony of Graham Magee.)

A. I wouldn't say it was in this case; but that isn't true generally.

Q. It is a fact, is it not, Mr. Magee, that you could have, if you so desired, used the attenuated "L" and attenuated "S" in your San Diego job? There is all kinds of room.

A. San Diego was rebuilt in 1942 and the lettering used there is of standard script lettering. The lettering used in Fresno is not our standard script lettering.

Q. This is what you call script (indicating) ?

A. That's right.

Q. I have shown you the San Diego photograph?

A. Yes.

Q. You say you used window background and fixtures. Do you use any particular unique type of window backgrounds? A. Yes, sir.

Q. In what respect is it unique?

A. It is unique in the respect that we designed ourselves this window background.

Q. What does it consist of?

A. It depends on the stores.

Q. Then it is different in every store, is that right?

A. It depends upon whether you are talking about stores recently built, or stores we built five years ago.

Q. Then it varies from store to store, and would it vary according [80] to the date it was built?

A. The style of architecture changes; the ideas of our interior designer changes.

(Testimony of Graham Magee.)

Q. When you say you spend the money on window background—

A. We spend \$2500 to \$3500 on window background.

Q. That will vary from store to store and from time to time in style and design?

A. As these architects get new ideas they vary it.

Q. It is not a particular design you have adopted for all of your stores, is it? A. No, sir.

Q. You say you have tickets in your windows?

A. Yes, sir.

Q. With the names on them? A. Yes, sir.

Q. By that you mean a little price tag with the words "Lerner Shops?"

A. Yes, sir; and we have a certain amount of display material in the windows with Lerner names on them.

Q. Can you point out to me anything in these window displays in these photographs that—I am referring now to pictures and background to identify it in the mind of anyone knowing your stores as being your particular layout or design?

A. These windows weren't designed by us. This store was designed—

The Court: Will you read the last question, Mr. Reporter?

(Question read.)

A. These photographs here would make it understandable that you can't see the window background in view of the photography; but we have used in the past window backing which became

(Testimony of Graham Magee.)

standard [81] and became known by the public as the window back used by Lerner. We used a type of wood which was uniform throughout the country.

Mr. Robinson: Q. Will you confine yourself for present purposes to California?

A. We used types of wood in California that were standard throughout the stores, that were built in that immediate period. I just don't recall the name of the wood, but it was unusual wood; the same as we do with fixtures.

Q. Where is that visible?

A. That is visible from the store windows.

Q. Where, on the floor?

A. We use a flooring not used by other stores of our type. We use a mahogany flooring.

Q. You use a mahogany flooring?

A. That's right.

Q. That is the sort of thing you refer to as unique things you do?

A. That is the way we spend money in advertising.

Q. That is the way you spend money in advertising, by building mahogany floors?

A. That is right.

Q. Do you know whether or not the defendant has a mahogany floor in his window? A. No.

Q. Did you make it your business to see whether it was infringing on you in that respect?

A. No, because he couldn't get mahogany when he built his store.

(Testimony of Graham Magee.)

Q. Well, was it important for you to check up?

A. It was important if we thought he had the same type of flooring.

Q. This mahogany was only common to your stores at a particular date, and later on you abandoned it?

A. We only abandoned it [82] because since the war you couldn't get it.

Q. What kind of flooring does the San Francisco Market Street store have? A. Mahogany.

Q. What kind of flooring does the Grant Avenue store have? A. It has mahogany.

Q. What kind of flooring does the Oakland store have? A. Mahogany.

Q. Is the fact that he has mahogany floor so distinctive that the public would associate it with a Lerner Shop?

A. I don't know. I think maybe it is the only one of the kind.

Q. I will show you a photograph and point out the one I have on top, which happens to be the San Diego store, those little white dots appear to be about four inches by three inches, four inches long by three inches wide; those are price tickets.

A. It is about two and a half by two and a half.

Q. It has the price on it, and in very small type, "Lerner Shops."

A. I would say it is smaller than the price.

Q. Is that unique to Lerner Shops to put price tickets in the window?

A. It is unique in many stores. In other words,

a lot of stores don't do it. We have done it in order to build up good will with the public.

Q. Did you observe whether or not the defendant puts price tags in his window? A. No.

Q. Do you know he does not? A. No.

Q. Did you ever check up? A. No. [83]

Q. Did you think it was important whether he did or did not?

A. I haven't been in San Jose since he opened his store.

Q. You said something about the physical layout; I suppose it is as true of the physical layout as it is to the other things to which you testified, that the physical layout varies from time to time with the ideas of businessmen and architects, and they change from time to time?

A. Our physical layout doesn't.

Q. Your physical layout doesn't change; it is uniform? A. That's right.

Q. And what is characteristic of your physical layout that is not common to other places?

A. The type of fixtures we use.

Q. Do you have a specially built fixture?

A. Yes, sir.

Q. Do you use the same fixture in all your stores? A. Yes.

Q. In all your stores at all times throughout the country? A. That's correct.

Q. In all your stores at all times throughout California? A. That's right.

Q. Do you know whether or not the defendant is using that particular type of fixture?

(Testimony of Graham Magee.)

A. No.

Q. By reason of that particular type of fixture you use, a person knows he is in your store and not in another? A. I wouldn't know that.

Q. You wouldn't say that?

A. I wouldn't say that.

Q. Is that the purpose in having a particular kind of fixture, to use a particular type of layout?

A. The purpose is to [84] accomplish a particular picture in the physical appearance of the stores.

Q. You want to fix a particular impression on the buying public? A. That's correct.

Q. And you have that in mind when you make up your physical layout? A. That is correct.

Q. With the idea being when a person is in your San Francisco Market Street store, or your San Francisco Grant Avenue store, or in your Oakland store, or in your San Diego store, if he didn't look around to see what street he walked in from, he would realize he was in a Lerner Shop?

A. No, I wouldn't say that.

Q. Well, is that the idea? A. No.

Q. Of course, it is true, you don't know whether the defendant's layout resembles yours in any respect? A. I have never seen it.

Q. However, let me remind you that in response to one of Mr. Goldberg's questions as to what you did in the way of advertising, you did say that you consider your physical layout a form of advertising? A. That's right.

Q. Then, it is true you are desiring to produce

(Testimony of Graham Magee.)

an impression on the public associated with a particular physical layout? A. That is correct.

Q. The reason I asked you that question again is that I thought a moment ago you said "No," but perhaps I was mistaken. Mr. Magee, have you been in San Jose since this action started? [85]

A. No, sir.

Q. Do you know where the highway runs through San Jose?

A. I drove there last summer.

Q. Well, did you or did you not notice where the highway runs, and whether it runs the same place?

A. I think it passes through the main street; I don't recall just—

Q. Isn't it a fact you don't know?

A. I am only testifying from my recollection. The main highway bisects the main street. I may be wrong.

Q. Your recollection, when you testified on direct examination, when you said that the defendant's store was on the main highway, south of San Francisco, your recollection was that the main highway was First Street in San Jose?

A. No; I don't remember those streets by name, but I remember when you come in by the highway you can see the Lerner Shop.

Q. Isn't it a fact that the highway runs several blocks away? A. I don't know that, no.

Q. You don't? A. No.

Q. Then, on the other hand, you also don't know it does not?

A. My recollection is it bisects it; but I may be wrong.

Q. Mr. Magee, you stated on your direct examination that it is your practice to start in a large community, in an area, the largest community in an area, such as San Francisco, and then extend into surrounding country, or trade area?

A. That is correct. [86]

Q. That is correct. Do you have a shop in Los Angeles?

A. We opened our first store in Los Angeles in 1930—February, 1930.

Q. And when did you give it up?

A. We lost the store in 1942.

Q. So you do go in some places and quit and go out? A. No, sir.

Q. You did in Los Angeles?

A. We lost our lease.

Q. But you did go out?

A. But we did only because we lost our lease. We don't usually go out.

Q. Wasn't there any other location in Los Angeles available? A. There was not.

Q. In 1942? A. No, sir.

Q. It is your testimony, and you want the court to believe that in Los Angeles Lerner Shops closed its business solely by reason of the fact that the lease, where it was, then expired, and it couldn't get another location?

A. We couldn't obtain the 100 per cent location.

Q. You were once in Sacramento, weren't you?

(Testimony of Graham Magee.)

A. I have been in Sacramento a number of times.

Q. I mean a Lerner Shop.

A. We never had a store in Sacramento.

Q. You never had a store in Sacramento?

A. No, sir.

Q. What did you have in that store that was leased to Lerner Stores Corporation of Maryland by Elise A. Drexler, the one concerning which you had negotiations with me and Judge Cerf?

A. We had no store there. There were tenants on the property.

Q. What happened in Sacramento when Dupen and Desen and another [87] person, a jeweler, in another store, were there, and you took the lease with the expectation that you, yourself, would open up?

A. We bought ourselves off the lease.

Q. You changed your mind?

A. No, we bought ourselves off the lease.

Q. You did intend to go in?

A. The proof of the fact is we have a lease next door to this property you speak about.

Q. When did you take this lease?

A. We bought the property in 1939.

Q. 1939? A. Yes.

Q. So, prior to 1932, you did intend to go into Sacramento? A. That's right.

Q. Then you changed your mind and bought yourself off the lease? A. That's right.

Q. Is that right? A. That's right.

(Testimony of Graham Magee.)

Q. This lease is dated the 12th of September, 1929. You bought yourself off the lease in 1932?

A. That's right.

Q. And from 1932 to 1939 you weren't in Sacramento?

A. We couldn't obtain a location we wanted.

Q. You had one right next door to where you are now; so that you weren't satisfied with the location?

A. We weren't ready to go into Sacramento at that time.

Q. Between 1932 and 1939 you weren't in Sacramento, because part of the time you had no intention of being there?

A. We found San Francisco and we went to Sacramento— [88]

Q. Just a minute. Answer my question. During part of the time you had no intention of going to Sacramento?

A. Not until we opened in San Francisco.

Q. Not until you opened in San Francisco?

A. Then we made a more strenuous effort to get a lease.

Q. Is there any place where you had a lease and abandoned it for any reason? And I don't want you to tell me, or to take me too literally on the word "abandoned"—give it up, quit it, sold it, expired, bought yourself off? A. Whereabouts?

Q. Any place in California, or in any other location?

(Testimony of Graham Magee.)

A. That would take too much of the court's time to do it.

Q. Then, there were cases where you had leases and abandoned them for some reason or another and got out? A. That's right.

Q. Some of the time you had leases and never even opened a store? A. That's right.

Q. And Sacramento isn't the only one?

A. That's right.

Q. And it isn't the only one in California, is it?

A. No, we had a lease in San Jose.

Q. That you gave up? A. Yes, sir.

Q. When?

A. I would say in 1931 or 1932.

Q. So you had a lease in 1931 or 1932 and gave it up? A. That's right.

Q. How long did you have it?

A. I don't remember.

Q. And I suppose you gave it up because it ran out, or did you buy yourself out?

A. I imagine we bought ourselves out. [89]

Q. You got out of San Jose, is that right?

A. That is my recollection.

The Court: Have you much more?

Mr. Robinson: Yes, I have.

The Court: We will take a five-minute recess at this time.

(Recess.)

The Court: Proceed.

Mr. Robinson: What was the last question and answer, please, Mr. Reporter?

(Testimony of Graham Magee.)

(Record read.)

Mr. Robinson: Q. Were there any other places in the State of California where a similar situation occurred?

A. Those are the only two cities, according to my recollection.

Q. Returning to these photographs again, Mr. Magee, you state from time to time your lettering changed according to the ideas of the architect, or your own ideas? A. Yes.

Q. It changed from time to time? A. Yes.

Q. I call your attention to the fact that three of the six photographs introduced here, the Stockton, San Diego, and Huntington Park photographs, where a part of the lettering appears to be uniform, and what you call script, that they are dated, two of them are dated 1943, and one of them is dated August, 1942. They were built at about the same time?

A. The sign was put on Stockton in 1943; and the store was built, according to my recollectin, in 1940. [90]

Q. What kind of a sign was it before?

A. It was a bronze lettering, similar to the lettering on the top of the building.

Q. Square lettering and block lettering; the top of the building still has a block lettering and you changed it to what you call script?

A. That's right.

Q. And those signs went up in 1943 and the other one in 1942.

(Testimony of Graham Magee.)

A. Huntington Park was 1943, and San Diego was 1942.

Q. So they went up about the same time?

A. That's right.

Q. And the next job was Fresno?

A. That was the last store we opened.

Q. That was after the defendant opened?

A. That's right.

Q. You had by that time abandoned that script which you had that was common to you in 1942 and 1943? A. We haven't abandoned it, at all.

Q. You changed it to something else?

A. There was a different architect. The New York office didn't design the Fresno store.

Q. But, in any event, that Fresno store—

A. Has a different script letter.

Q. —has a different script letter, and that was opened after the defendant's?

A. That is correct.

Q. And, as a matter of fact, after the suit was filed? A. That is correct.

Q. By several months?

A. That is correct.

Q. Is that right? A. That is correct.

Q. And Oakland and San Francisco stores are block lettering? [91] A. That's right.

Q. You still maintain that this is script (indicating)? A. Yes.

Q. That is in San Diego? A. Yes, sir.

Q. You do not define script as meaning a simulation of handwriting, do you?

(Testimony of Graham Magee.)

A. No; it is generally known as script in the construction field.

Mr. Robinson: This is what we are talking about, your Honor (indicating).

The Court: I have seen them all.

Mr. Robinson: Q. You stated, Mr. Magee, that it is your policy to open up in the populous center and then move to a smaller community?

A. Outlying communities.

Q. Outlying communities?

A. That's right.

Q. And when you move to outlying communities you also take a 100 per cent location?

A. That's right.

Q. And your reasons for taking a 100 per cent location in the outlying community are the same as they are in the big city, aren't they?

A. That is correct.

Q. Of course, when you go into an outlying community you go down there to get business you wouldn't otherwise get in your central store?

A. What happens is, we have a certain amount of business there, like, take the concrete case, the San Francisco Market Street store has a considerable amount of business from customers now living in San Jose. When we opened our store in San Jose those customers, some of those customers may continue to [92] come to San Francisco and shop in San Francisco, but they are now buying their merchandise in San Jose.

Q. You don't mean to tell this court you open

(Testimony of Graham Magee.)

a store to take care of customers in San Jose otherwise taken care of by the San Francisco store?

A. But you get those customers as a nucleus for your business, and in addition you get other customers from San Jose and immediate surrounding towns.

Q. Isn't it a fact, Mr. Magee, and has it been your experience that when you do open in an outlying community and take a 100 per cent location in the outlying community for the reasons you have stated, that you still continue to get business in your own metropolitan location from that same outlying community?

A. I would say so, because the women of San Jose still come to San Francisco to buy merchandise, and when they do they will go into the San Francisco store, because it is a larger store, and would get a wider selection of merchandise and visit the San Francisco store.

Q. They come to San Francisco to buy, and your experience is they come whether they are vacationers or travelers or shoppers; they find their way to the 100 per cent location?

A. That's right.

Q. And if you are at the 100 per cent location they become potential customers by reason of that fact?

A. They usually see our store when they come there and come in and trade, because they know the Lerner reputation and merchandise. [93]

Q. I think I will ask you this: My older col-

(Testimony of Graham Magee.)

leagues would tell me I should not ask you this: Do you maintain, Mr. Magee, that the people come from San Jose to San Francisco for the express purpose of shopping at Lerner shops?

A. I would say some customers do.

Q. You wouldn't know how many, or what percentage? A. I wouldn't know how many.

Q. That is a guess on your part?

A. No, it is not a guess on my part; but I have frequently letters from women in cities such as San Jose, asking us why don't we open a store in San Jose, so they don't have to go to San Francisco to trade.

Q. How many letters do you have?

A. I would say they wouldn't be in great numbers.

Q. That is what I thought. Now, Mr. Magee, your San Francisco stores does business with people from New York? A. Yes, sir.

Q. It does business with people from South Dakota? A. I assume so.

Q. And it does business with people from every geographic point I might mention inside and outside of the United States, and that at times you have taken care of people from Timbuktu?

A. That's right.

Q. That is why you are in 100 per cent locations, because those are the crossroads of the world?

A. They come from Canada or Cuba.

Q. And you didn't receive any letters from anybody in Cuba [94] asking you to open a store there

(Testimony of Graham Magee.)

so they wouldn't have to come to the United States?

A. No, we haven't like that; but we have had letters they wouldn't have to go to Miami to shop if we had a store in Havana, and I went to Havana to try and find a location.

Q. How many letters?

A. I don't know how many letters. People are so interested in getting our merchandise that they want a store in their town.

Q. Now, about the name Lerner, you started out as a lawyer, didn't you, Mr. Magee. A. Yes.

Q. Not as a salesman?

A. No, I was a lawyer.

Q. I may say you have become one. I mean, your enthusiasm for your profession is practically infectious.

A. I couldn't make a living in the law business, so I went into the merchandising business. [95]

Q. I don't want you to think that we have anything against the Lerner people in this case. Nothing is said in criticism here. I believe you said you were not aware of any other shop in California that used the name "Lerner" directly or in combination with the—

A. In the ready-to-wear field.

Q. In the ready-to-wear field, in any of the items you handle you don't know anybody else except the defendant handling them under the name "Lerner"? A. That's right.

Q. That is true of all California, as far as you know? A. That's right.

(Testimony of Graham Magee.)

Q. And I believe you stated it is also true of the West Coast, as far as you know?

A. That's right.

Q. It is also true of the rest of the country, as far as you know? A. No, it is not.

Q. Tell us where there are Lerners in the rest of the country, if you know?

A. There is a Lerner-Vogue in the Middle West.

Q. What is that? A. Lerner-Vogue.

Q. Do you own that? A. No, sir.

Q. How near is it to your shop?

A. They are in a great many states.

Q. What is that?

A. They are in a great many states.

Q. It is another chain company?

A. Yes, sir.

Q. Not connected with you at all?

A. That is correct.

Q. How many cities are they in, do you know?

A. I am guessing, and I would say they are in twenty cities. [96]

Q. In what states?

A. The Midwest. Their home office is in Kansas City.

Q. Then they are in Kansas, Missouri, Illinois, Idaho—

A. They go down towards the South.

Q. They handle the same kind of merchandise as you? A. That's right.

Q. And have no connection with you?

A. No.

(Testimony of Graham Magee.)

Q. How long have they been in business, do you know? A. I don't recall.

Q. What name have they on their shops?

A. They now have J. S. Lerner-Vogue.

Q. J. S. Lerner-Vogue? A. That's right.

Q. Formerly they had another name?

A. They had Lerner-Vogue.

Q. Did you have litigation? A. Yes.

Q. What was the result of the litigation.

A. We settled it. In some cities they eliminated the use of the name "Lerner," and in other cities retained the use of the name "Lerner," but put "J. S." in front of it.

Q. That was by settlement with you?

A. That's right.

Q. Incidentally, by settlement with whom, the Maryland corporation or the California corporation? A. The Lerner Stores Corporation.

Q. Which one of the Lerner Stores?

A. There is only one.

Q. There is only one now, the others having been in some way obliterated. How many years were they in business when they [97] first started?

A. I don't know, to tell you the truth. They had been in business long before I ever knew of them, and possibly before we went out West. When we found out about it, we started this litigation. We eliminated—they use a different name in the State of Texas as a result of this litigation.

Q. You say you don't know when they started, but when you found out, you started litigation and settled? A. Yes.

(Testimony of Graham Magee.)

Q. When did you find out?

A. I would say in 1935 or 1936.

Q. When you found out and when you were in litigation, I believe at that time you were general counsel for the corporation? A. Still am.

Q. And you handled the negotiations?

A. Yes.

Q. And you investigated how long they had in fact used that name?

A. I know I didn't. I have an attorney that handled it. I don't get into the litigation at all.

Q. Except this way? A. As a witness.

Q. What is your information on the subject as to the length of time they were in business prior to 1935, prior to the time you found out they were using the name?

A. I have dismissed that matter from my mind, but I would say ten years.

Q. They were in business at least ten years prior to 1935, is that right? A. That is my guess.

Q. And they were a chain store in the same line of business as you? A. That's right.

Q. I suppose the way you find out when somebody opens under a [98] name you consider an infringement is by someone coming in—

A. The customers.

Q. —and asking you something, or you get the information some way?

A. It usually comes from customers. They say they have been in our new store in San Jose.

Q. Or something like that?

(Testimony of Graham Magee.)

A. That's right.

Q. And I suppose it is your position that no store could be very long in San Jose, Sacramento, or any place around here under a name which, for the purpose of argument, let us assume is identical with yours; you would hear about it, is that right? And if you didn't hear about it, you would assume it wasn't there? A. That's right.

Q. And if it was there and you didn't hear about it, you would assume it wouldn't make any difference to you?

A. It would make plenty of difference to us.

Q. And if it was there and you didn't hear about it, then it wasn't doing you any harm?

A. I wouldn't say that, because, as a matter of fact, it is one of those things that couldn't happen.

Q. Couldn't happen?

A. No; if another store is opened, the customers or someone is going to tell us about it.

Q. Mr. Magee, would you think I was dreaming if I told you there is a Lerner store, a Lerner shop, or a store using "Lerner's" as the principal part of its name within three blocks of one of your stores in California, and has been there [99] long before the commencement of this action?

Mr. Goldberg: In ladies' ready-to-wear?

A. I would say you were dreaming.

Mr. Robinson: Q. Do you know of any such shop that handles such items as you handle?

A. With the name "Lerner's"?

Q. With the name "Lerner's" as the principal part of its name? A. I do not.

(Testimony of Graham Magee.)

Mr. Robinson: Do we adjourn now, your Honor?

The Court: As long as we are here we might as well use the time.

Mr. Robinson: I think that is all at this time. I would like to have Mr. Magee return.

The Court: Have you any redirect examination?

Mr. Goldberg: I have some questions I think we might try to cover at this time.

The Court: Very well.

#### Redirect Examination

Mr. Goldberg: Q. Mr. Magee, these leases which plaintiff's counsel has given considerable expression to, which you have given up in one form or another, those were all during the early depression years? A. That is correct.

Q. And when was the last time that occurred, in what year? A. 1932.

Q. Has it occurred since then?

A. It hasn't.

Q. In those cases in which the plaintiff was involved, was it [100] necessary to pay a consideration in order to be released from the lease?

A. You mean where plaintiff's counsel was involved?

Q. I mean where the Maryland corporation was involved?

A. Oh, yes, we paid a consideration. It was a corporation of the New York Stock Exchange. We were on the New York Curb at that time, and it

(Testimony of Graham Magee.)

was in good standing, and we had to pay to get off these obligations.

Q. With respect to the leases you have taken and on which you have not yet constructed or reconstructed any stores, has the company means with which that is to be done? A. Yes, sir.

Q. In what manner has that been done?

A. We borrowed \$5,000,000 from the Metropolitan Life Insurance Company for post-war expansion.

Q. That money is in the hands of the company for that purposes at the present time?

A. It is reflected in our annual statement.

Q. After you lost your Los Angeles lease and it had expired and the landlord rented the premises to somebody else, I assume that is how you lost it?

A. I tried to stay, but he leased it to somebody else.

Q. Have you made efforts to find another one?

A. We have been negotiating for years.

Q. Did you find one?

A. We have another lease and we expect to make arrangements next year, providing we can make the arrangements.

Q. In Sacramento did you have difficulty in finding another comparable location?

A. We were forced to buy the property. We couldn't lease the property from the insurance company.

Q. So you bought the property in order to acquire a lease on it? A. That's right.

(Testimony of Graham Magee.)

Q. In connection with the operation of the stores in California and the operation of the stores elsewhere in the country, although you have separate corporations, in a number of instances wholly owned subsidiaries, how is the actual operation conducted as between the parent company and the subsidiaries?

A. Well, the parent company owns all of the capital stock of the subsidiary companies. Actually we have a buying corporation and that purchases merchandise in New York and distributes it to these state corporations. These individual state corporations, in turn, declare dividends, and the money eventually gets into the Maryland corporation, the parent company.

Q. What I meant is this: As far as management and operation are concerned, is that carried on by the individual companies or by the parent company?

A. The officers of the parent company are the same officers of the state corporations. In other words, I hold the same office in every state corporation as I do in the parent company.

Q. So actually the business in California is conducted as if [102] it were a division or a department of the Maryland corporation?

A. That is correct.

Mr. Robinson: We object to that on the ground it calls for the opinion and conclusion of the witness. By that I mean the legal facts speak for themselves.

The Court: I will overrule the objection.

Mr. Goldberg: Pardon me, your Honor?

(Testimony of Graham Magee.)

The Court: I will overrule the objection.

Mr. Goldberg: If the Court please, although I think most of the information which has been elicited or which appears in this annual report has already been elicited, but in addition there are certain photographs and lists of stores, and so on; I think it would be helpful if this report were put in evidence as an exhibit, and I will be glad to furnish counsel with a copy, although I don't have it here. He can examine it, and if there is any part he wants to examine Mr. Magee on or object to, that can be done during the course of the trial.

Mr. Robinson: I object to that on the ground the materiality is not sufficiently identified or explained. Does it pertain to nation-wide operation? And if it does, it is not material here. I believe the Court has in mind that we so far have confined ourselves principally to California. This is a report for the year ending January 31, 1945; after this litigation commenced, and obviously contains matters which first arose after that and should not be in the record at all. [103]

Mr. Goldberg: I don't think there is any basis for the objection, if the Court please, for this reason: There were many questions asked as to types of fronts, types of fixtures, general appearance, that weren't confined to California by counsel for the defendant, and questions asked as to what they did in all parts of the country where the company was going to carry on with its leases, which is a present question as well as a question that was rele-

(Testimony of Graham Magee.)

vant at the beginning of the action. This report covers the period commencing January 31, 1944 and covers a period which includes the time when the defendant's store was opened.

The Court: If it is offered in evidence we will have counsel for the defendant cross-examine this witness on 181 different stores. I don't see what the relevancy of putting in this whole report is, Mr. Goldberg.

Mr. Goldberg: Maybe I will have to tear off the cover and offer the photographs of a large number of stores and list of stores which appear on the cover.

The Court: You have already enumerated the number of stores, so you don't need that. Is that a photograph of all the stores?

Mr. Goldberg: It isn't a photograph of all the stores; it is just how much you can get on two covers. Some are exteriors and some are interiors. It shows a number of interiors which are of varying kinds, and a number of exteriors of varying kinds, [104] and varying letterings; and I think it gives the Court a better picture than is developed.

The Court: Do you have any objection to these photographs going in?

Mr. Robinson: The last remark of Mr. Goldberg indicates that certainly I will have to cross-examine the witness on these.

The Court: I thought he said they had standardized them.

(Testimony of Graham Magee.)

Mr. Robinson: That is what he said. It goes to impeachment.

Mr. Goldberg: It is for the purpose of clarifying that testimony, because if we have the report read in, I think your Honor would see that actually, although Mr. Magee made the general statement that they attempted to have uniform fixtures and uniform window backs, yet actually those things varied with the particular period when the stores were put in, and as to whether the stores as a whole, the fronts vary and the windows vary.

The Court: That leads me hopelessly astray; so you might find the defendant's store is like some and not like some.

Mr. Robinson: My objection is this: This is an attempt to impeach his own witness. He said the windows were not uniform, the signs were not uniform with certain limited exceptions; that the fixtures were not uniform with the exception of the mahogany floor; but that the interior was uniform, that which he called the physical setup. Now, Mr. Goldberg wishes [105] to introduce those for the purpose of showing it is not so.

The Witness: The cornices are the same.

Mr. Robinson: It will take all day to cross-examine him on that.

Mr. Goldberg: It doesn't make any difference if we are here all day. If there are actual photographs that clarify this situation, it seems to me we are entitled to have it clarified.

The Court: I don't see any objection to the pho-

(Testimony of Graham Magee.)

tographs, but I don't see how they are going to be of any importance one way or the other, if you say they are different in different stores.

Mr. Goldberg: They are only of importance for this—

The Court: If that is so, counsel for the defendant objects to it.

Mr. Goldberg: I think counsel for the defendant objects because he finds there are a lot of store fronts that are not particularly different from the defendant's store front.

Mr. Robinson: Oh, no.

Mr. Goldberg: Then you shouldn't object.

Mr. Robinson: Oh, no.

Mr. Goldberg: And furthermore, the interiors of the various stores do differ.

The Court: Mr. Goldberg, just what is it you are offering in evidence, the pictures of the stores?

Mr. Goldberg: Yes, your Honor. [106]

The Court: That is all you want?

Mr. Goldberg: I want to put in the record as a whole, but if there is any objection and the Court sees any objection, I am willing to waive that and offer just the pictures of the stores.

The Court: I will allow the pictures to be admitted in evidence, and you may have an objection.

Mr. Robinson: There is one thing we will want to examine Mr. Magee as to these. We object on the ground there is no foundation laid.

The Court: You don't object to the fact that they are not the pictures?

(Testimony of Graham Magee.)

Mr. Robinson: Oh, no, as to the identity of them, as to where they are from, I will have to examine Mr. Magee on that.

The Court: The pictures are admitted in evidence. Go ahead and ask the next question.

(The photographs were marked Plaintiff's Exhibit 7 in evidence.)

Mr. Robinson: Could I have a copy of that, Mr. Goldberg?

Mr. Goldberg: Yes. We will have it for you. It is in the office. I think that is all.

#### Recross Examination

Mr. Robinson: Q. Mr. Magee, you stated in response to Mr. Goldberg's question that those leases that you bought your way out of in 1932 and thereabouts was on account of the depression?

A. That's right. [107]

Q. By that you meant to say it was not profitable for you to continue to keep those leases?

A. We weren't ready at that time to expand our business and open new stores.

Q. In other words, the simple fact is you decided it wasn't profitable for you to keep the leases or to open stores where you did have leases?

A. The answer is, it was not profitable, or it was not propitious at that time to open new stores.

Q. So you decided to get out until it was?

A. We decided where we could buy ourselves out of leases to do so, and then at a later time open stores in those communities.

(Testimony of Graham Magee.)

Q. And your object in going in anyplace is to go in if you think it is going to be profitable, and stay out if it isn't going to be profitable?

A. That is true.

Q. You mean to say you go into a community if you think it is going to be profitable?

A. We go into a community if we thought it was going to be profitable.

Q. And if you go into a community where you thought it was going to be profitable, and if after passage of time you find it is not going to be profitable, you get out?

A. We never assumed at any time it wouldn't be profitable to have a store in San Jose. We believed it wasn't propitious to have one there, to retain the lease.

The Court: I think this matter has been gone into.

Mr. Robinson: That is all for today, your Honor.

The Court: Do you wish to examine the witness on those [108] photographs?

Mr. Robinson: We will be quite a while on those.

The Court: Go ahead, then.

Mr. Robinson: Q. Will you mark on that what store that is?

A. That is Fifth Avenue, New York.

Q. Just mark it right on the face of it. Let the record show I handed the witness Plaintiff's Exhibit 7.

A. San Francisco, Philadelphia, Newark—

Q. Have you got them all?

(Testimony of Graham Magee.)

A. No; Cincinnati here; St. Louis; Durham, North Carolina; Brooklyn; El Paso, Texas; Lansing, Michigan; Florence, South Carolina; Park Chester; New York City; West Palm Beach, Florida; Newport News, Virginia; Miami, Florida. There are a few I just don't recollect.

Q. You have not identified any of the interiors, Mr. Magee.

A. No. I will be glad to try to do that. I think I would be guessing if I put the interiors.

Q. You are unable to identify any of the interiors?

A. I could say it was some city, but I would be guessing.

Q. Are you unable to identify any of the interiors because they are all alike, or all different?

A. Because the physical layout of the interiors is different. It depends upon the physical layout of the building. In other words, if you had a store 30 feet wide, you have no center aisle casing. If you have a 48-foot store, you have a center island.

Q. You are unable, however, to identify any of these interiors? [109]

A. If I took more time of the Court I could.

Q. The reason for your inability to identify them is not because they are all alike?

A. It is because I want to be accurate.

Q. Each of these differs materially from the other?

A. Yes, because I would say all of our stores differ in size. Very few stores would be of different

(Testimony of Graham Magee.)

size, so that the change in the physical layout of the store—

Q. So that the lighting, the physical setup, and so on, is all different?

A. The lighting changes with time.

The Court: Can't we cover this, gentlemen? I don't mean to be persistent, because I practiced law a long time myself, but let us assume after I have heard one fact once I have heard it, and don't repeat it a dozen times.

Mr. Robinson: That is right.

The Court: Let us not take the Court's time and your time on any other matters. Your case is not that this defendant simulated the front or the price tags, but the fact that he used the name. We are wasting a lot of the Court's time, gentlemen. I think I am competent to determine at this point and after the pre-trial that what is in issue is that the name "Lerner" as it is being used by this defendant in San Jose and under the circumstances presented by this case warrants the granting of an injunction. That is all that is involved.

Mr. Goldberg: That is right. [110]

The Court: So why should we spend two days when we can get down to the physical facts?

Mr. Goldberg: Of course, the physical facts surrounding are one thing, and that is simple; but in addition to that, we have the extent to which the operation of a store by the defendant in San Jose affects the business of the plaintiff. That is one thing which is, I think, incumbent on us to prove.

(Testimony of Graham Magee.)

The Court: Only if it appears that there is a reason for holding that unfair competition exists. If there isn't legal basis for unfair competition, it wouldn't make any difference whether the plaintiff's business is affected or not, because everybody has some competition in their business.

Mr. Robinson: That is true. I don't like to argue the matter at the beginning of the trial.

The Court: At this late hour I am telling you it is wholly unnecessary to take up matters of this kind, because I think you both agree that is what the issue is.

Mr. Goldberg: We say there isn't any question as to the infringement in the use of the name that is involved; but naturally, subsidiary to that, we have a burden of proving those things that entitle us to maintain this action.

The Court: I will grant that, Mr. Goldberg, but there isn't the remotest connection of what kind of an arrangement these stores have throughout the United States.

Mr. Goldberg: I never asked any question about the interior. [111] That was done by counsel for the defendant.

The Court: You offered the pictures and at the same time can we eliminate this phase of the examination as we did at the pre-trial conference, that the issue of the case is the use of the name in the manner in which the plaintiff charges it was used?

Mr. Goldberg: I don't think there is any other question.

(Testimony of Graham Magee.)

The Court: If we agree, all right.

Mr. Robinson: Mr. Magee was the one that brought it in.

The Court: Then I will eliminate any further examination on this subject and we will take an adjournment until tomorrow morning. Will you have in mind the understanding we made as to the issue we are to test?

Mr. Goldberg: If I have a misapprehension about that, I would like to be correct.

The Court: All right.

Mr. Goldberg: As far as the use of the name is concerned, I expect to prove it by Mr. Lerner. We have photographs, and it is admitted. We start with the proposition that Mr. Lerner opened a store and called it "Lerner's" and he made certain changes later. We have it in a deposition.

Mr. Robinson: "Lerner Apparel" is the name on the sign.

Mr. Goldberg: The question is whether that gives the plaintiff a right to have the defendant enjoined, and I think one of the things we have to prove in this case is confusion or [112] likelihood of confusion. We intend to prove actual confusion in that area, and we think when we have proved actual confusion and actual damage through loss of business, and actual prospects of loss of business, and the defendant made no attempt when he opened the store under a name used by the plaintiff, that he didn't differentiate that, we are entitled not to have him use that name.

(Testimony of Graham Magee.)

The Court: You are making an argument, and it seems to me the fact you are referring to in your statement you just made shouldn't take over an hour to cover.

Mr. Goldberg: We have several witnesses from the stores. We have the manager and we have department heads.

The Court: On the matter of people saying they were confused?

Mr. Goldberg: Yes. These same witnesses will prove that we are known as "Lerner's" even though we have the sign "Lerner Shops" on the front of the premises. That is an issue. And of course also we would show that the defendant carries the same type of merchandise, the same classes of merchandise we carry, and that the price at which they sell their merchandise falls within the price at which we sell our merchandise; so there is potential as well as actual competition for trade, which I do think that once we finish with Mr. Magee that our other witnesses should be relatively short.

The Court: We have nothing more of Mr. Magee, have we? [113]

Mr. Robinson: Oh, yes.

The Court: What do you want?

Mr. Robinson: I want him tomorrow on the manner in which the name is used. This has a picture of some twenty shops.

The Court: You have already shown how the pictures show the names.

Mr. Robinson: These go all over the country.

(Testimony of Graham Magee.)

The Court: I am not going to consider that. I don't see that that is material to the case.

Mr. Goldberg: I don't know that it is material. It is probably collateral. Counsel stressed a great deal the fact that on some so-called script we didn't open up a store in Fresno until after the San Jose store was opened. I have twenty more individual pictures of script signs. I haven't brought them in, because I don't think it is relevant, except the fact that we have been using the script letters in more recent years than the block letters only because the defendant stresses the fact that we use script and they use block.

The Court: I thought we had agreed it is the use of the name that is only material.

Mr. Goldberg: We do, yes. I didn't offer that for that purpose.

The Court: It doesn't seem to me there is anything particularly stereotyped. There is a certain similarity, but there are a great many differentiations. The ultimate fact [114] upon which you must rest your case is the use of the name "Lerner's."

Mr. Goldberg: That is basic, and other things may or may not have a bearing. I don't want to be met with the argument after the evidence is in that there is a difference between what plaintiff does and what the defendant does, because the plaintiff uses block letters and the defendant uses script letters, because there are any number of, dozens of signs where the company uses what you might call script, or the same type of thing, although not connected,

(Testimony of Graham Magee.)  
that the defendant uses. Now, if it means anything—

The Court: I saw the picture of the defendant's sign, and as I remember it, it is a continuous line, and that is not true in the case of your sign. If we are going to get into those categorical differences—

Mr. Goldberg: I don't want to get into those categorical differences. I say that if we are going to be met with an argument after the evidence that we used block and they used script, and that tells the customer they are not us, I say that doesn't follow, because we have a lot of people who have seen our stores in many places.

The Court: But I couldn't issue an injunction because someone from Oshkosh went into this San Jose store.

Mr. Goldberg: I say I don't think it is relevant how the sign is written. [115]

The Court: I don't see how there is any need for argument now. They show the kind of lettering used by the plaintiff and the kind of lettering used by the defendant, and in my mind that is a very minor aspect, an extremely minor aspect. The only question involved is the use of the name.

Mr. Goldberg: I agree with your Honor. I think it is minor.

The Court: Is there anything else you want to examine this witness about?

Mr. Robinson: Yes, there is one matter I want to ask him about tomorrow morning. On this case I must point out the complaint alleges that we have

(Testimony of Graham Magee.)

deliberately adopted the script they are using, and I now understand—

The Court: I don't wish to interrupt you, but I don't see that there is anything to argue about. The pictures speak for themselves. I can see them.

We will take an adjournment until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Friday, April 27, 1945, at 10:00 a.m.)

---

Friday, April 27, 1945—10:00 a.m.

The Court: Proceed.

Mr. Goldberg: I understood Mr. Robinson had some questions on a particular subject he wanted to examine Mr. Magee on. There were a few questions I find I hadn't covered, and I would like to ask them first.

### GRAHAM MAGEE

resumed.

#### Further Redirect Examination

Mr. Goldberg: Q. Mr. Magee, in its operations covering this past fiscal year and prior fiscal years, did you state plaintiff made a profit from those operations? A. Yes, it does.

Q. Can you tell us what that has been in the last fiscal year?

A. It was in excess of \$2,000,000.

(Testimony of Graham Magee.)

Q. Does the plaintiff have a net worth, I mean by that a balance of assets in excess of liabilities?

A. For the year ending January 31, 1945, it was in excess of \$14,000,000.

Q. Can you tell us what is the rate of mark-up which the plaintiff uses in the sale of its merchandise? A. Approximately 33 percent average.

Q. Can you explain what that means? I mean, what is that with reference to the selling price or the cost?

A. In other words, you have a profit of—the original mark-up is [117] approximately 33 percent under your cost.

Q. That is what I mean. If you had an article that cost \$1 you would sell it for \$1.33, is that what you mean? A. No, for \$1.50.

Q. In other words, the 33 percent is the gross profit on the sale? A. That's right.

Q. Now, you stated yesterday that you didn't know of any other store operating under the name of "Lerner" or having "Lerner" in its name, now in this area, California or the West Coast, carrying merchandise that is sold in Lerner stores. In making that statement do you have in mind all articles sold by you?

A. I had in mind any store selling ready-to-wear; that is, coats, suits and dresses.

Q. What about millinery?

A. That was an article I wasn't referring to.

Q. Is millinery a substantial item in your operation? A. No, it is not.

(Testimony of Graham Magee.)

Q. Do you sell it in all of your stores?

A. No, we do not.

Q. With respect to the various stores in California which you have testified to, there are now thirteen; is it or is it not common to all of those stores that they do business not only with the community where they are located but in the area surrounding that community?

A. The store does business from people living in the immediate vicinity and outlying districts.

Q. Yes. A. Yes. [118]

Mr. Goldberg: Those are all the questions I have.

The Court: Anything else?

#### Further Recross Examination

Mr. Robinson: Q. Mr. Magee, when you answered the question yesterday to which Mr. Goldberg directed your attention as to whether or not you knew of any other store on the West Coast using the name "Lerner" handling any item of merchandise that Lerner Shops handled, and you answered "No," you didn't at that time know of any, whether they handled a minor item or coats, suits and dresses?

A. What I was intending to answer, and I was maybe a little confused, I assumed we were talking about ready-to-wear, that is, dresses, suits and coats. I have known for some time that there are other stores in the State of California with the name

(Testimony of Graham Magee.)

“Lerner.” One sells men’s haberdashery and one sells ladies’ hats.

Q. You didn’t know about the hat shop yesterday? A. Oh, yes, I did.

Q. When you told me it was utterly fantastic—

A. I was referring to ladies’ ready-to-wear apparel, dresses, coats and suits.

Q. You never explained to me what became of your Lerner Blouse Company. You know what I mean by that; I mean the Lerner Blouse Company which later became Lerner Stores. As far as you are concerned, there is no further Lerner Blouse Company, is there?

A. We had two Lerner Blouse companies; one was [119] formed in New Jersey and one was formed in Delaware.

Q. And they changed their names?

A. Both changed their names.

Q. And became Lerner Stores Corporation of New Jersey and Delaware, respectively?

A. That’s right.

Q. And one of them went into bankruptcy?

A. No, they both went into bankruptcy.

Q. They both went into bankruptcy?

A. That’s right. In fact, three companies went into bankruptcy.

Q. All three companies went into bankruptcy?

A. No, three companies went into bankruptcy.

Q. Incidentally, about this company going into bankruptcy, you said Lerner of California bought its assets?

(Testimony of Graham Magee.)

A. That is not true; I didn't make that statement.

Q. Didn't you say one of the companies went into bankruptcy and Lerner of California bought its assets, immediately before it went into bankruptcy?

A. That's right.

Q. So is had the obligation of Lerner of California to pay for?

A. That's right. On merchandise you had notes; and on the fixtures, furniture, and equipment, and goodwill, there was capital stock.

Q. What was accomplished by that bankruptcy?

The Court: I thought we went into this before, counsel.

Mr. Goldberg: I don't want to object—

Mr. Robinson: I want to find out if they wiped out leases by that bankruptcy. [120]

The Court: We are getting pretty far afield.

Mr. Robinson: I agree with your Honor we are getting pretty far afield, but I have to meet the issue as it is presented. I will ask just one more question.

Q. Were any leases wiped out by that transfer and the bankruptcy of the corporation whose assets were acquired by Lerner of California?

A. I don't believe so, no.

Q. Is there a Lerner Blouse Company today?

A. No, sir, not owned by Lerner Company.

Q. Not owned by Lerner Company?

A. That's right.

Q. But there is a Lerner Blouse Company?

(Testimony of Graham Magee.)

A. Yes.

Q. It is quite a well-known outfit?

A. It is a manufacturer.

Q. It is a manufacturer? A. Yes.

Q. And it advertises, doesn't it?

A. I don't think it advertises.

Q. You don't know if it did or did not? You look in the trade journals and are familiar with the business?

A. It may be in the women's business; I don't recall.

Q. Incidentally, does the Midwest outfit advertise, this other outfit? A. Lerner-Vogue?

Q. Lerner-Vogue.

A. J. S. Lerner-Vogue.

Q. What States are they in? A. Well—

The Court: Counsel, I don't want to be adamant about this thing. I know how lawyers feel, but it doesn't serve any useful purpose to go over the same ground again. I thought [121] we were agreed we were to get down to your Store in San Jose that is run by your client.

Mr. Robinson: I am satisfied to do that if Mr. Goldberg will make a binding statement that these issues are out of the case, because Mr. Goldberg is not precluded in a later proceeding in a higher court on these things permitted to go unchallenged.

The Court: In order that the record may be clear on the rights of both parties, I will say, for the record, the Court doesn't intend to make any finding concerning any of these matters and will

(Testimony of Graham Magee.)

confine itself to whether or not there is unfair competition by the use of this name under the circumstances, as they present themselves in the record, pertaining to the time the defendant was engaged in business in San Jose.

Mr. Robinson: The particular problem I was addressing myself to is now merely preliminary to bring the witness back to the previous state of conversation: Was this principle that is being urged here of a sort of right of expansion by osmosis into outlying areas? And I am about to show that Lerner Shops themselves don't believe in that principle, and themselves violated it. If the Court will indicate to me that I am not required to meet that, that is to say, that this point, that it may be deemed unfair competition on Mr. Lerner's part to have opened in San Jose, because, as Mr. Goldberg contends, he should have expected that once Lerner sets up in San Francisco, and in line with this policy— [122]

The Court: I will say right now that the Court will exclude that issue. The only question, as I see it, in this case, is whether the use of this name on the street in San Jose with the nearest plaintiff's store in San Francisco constitutes unfair competition. I can't see that some secret intention on the part of plaintiff could possibly cause any rights to be vested in that.

Mr. Goldberg: I would like to have it appear, however, we do not stipulate or consent that this theory on which we rely, which is supported by au-

('Testimony of Graham Magee.)

thority, that there is an area of normal expansion to which we are entitled.

The Court: I understand that is your contention; but a theory of law can't take the place of facts.

Mr. Goldberg: That's right; we think there are facts that sustain our theory.

The Court: But you have put into the record that you had this lease, and you have it, and as I say, the Court is going to confine itself to the question as to whether or not the use of the name by this defendant in his store under the circumstances that the record will disclose, and having in mind the plaintiff's operation and store in San Francisco and Oakland constitutes unfair competition; and the other consideration, as to whether or not there is any intention to have a store there, the Court isn't concerned.

Mr. Goldberg: I would like to say this: We are not relying [123] on any unannounced or secret intention and we are not relying exclusively by any means on the fact that we had negotiated a lease which was in existence when the defendant opened his business; but we do rely on the general course of conduct in the operation of its business, that it is an expanding business, that it already had thirteen stores in California and was actually negotiating and had negotiated leases for many other purposes; that it was part of its practice to expand into areas like San Jose.

The Court: The record will show whatever the policy of the company is in that respect. I will say

(Testimony of Graham Magee.)

for the benefit of counsel for the defendant in that regard that I can't see anything to that point, at all.

Mr. Goldberg: I must say there are a lot of other courts that have seen it.

The Court: That may be true, but if that theory were correct, there would be no place in the United States that any man having the name of Lerner could open a store.

Mr. Goldberg: I think your Honor overdraws that. It would be true, if we were in New York City and we started to expand, we could not say, since we expect to get into California, this would be the case. But in this case this was an imminent situation. That is why the rule of law is applicable to us, whereas it would not be if we would say we hope to open in Canada, and nobody can open a store in Canada under the name of Lerner. [124]

The Court: I don't think it applies to this case. The record will show that, if a judgment should go against you. What your contention is, is in the record. So there can't be any question about it.

Mr. Robinson: I am in a paradoxical position. It is in the record and I agree with your Honor it has no application to the case; but at the same time it goes unchallenged and if Mr. Goldberg is successful in another forum and he has that unchallenged set of facts there, where does that lead me? In other words, I have to meet the issue, but I don't think it is relevant.

The Court: The issue is there for what it is worth.

(Testimony of Graham Magee.)

Mr. Robinson: What I was trying to prove and answer was that this so-called policy which Mr. Goldberg refers to, and upon which he claims a legal right, the policy of expansion as enunciated by the Lerner Company, where they go where they please, they, themselves, are violating their own policy.

The Court: I don't understand what you mean.

Mr. Robinson: They, themselves, would have no hesitancy in coming into San Francisco, San Jose, or any other place, if there was somebody else there doing business under the name of Lerner, or going into, say,—well, let us take a case where neither party is—let us go to Salt Lake City, where they and somebody else were equidistant from Salt Lake City, and they say, "You can't come in here." [125]

The Court: Just a minute. That is a matter of argument. All this witness can do is give his opinion.

Mr. Robinson: I want to show what they actually did.

The Court: You mean there is actually some other business doing the same kind of business as Lerner and they went into that field?

Mr. Robinson: Yes.

The Court: Go ahead.

Mr. Robinson: Q. You recall I asked you what States J. S. Lerner-Vogue was doing business in?

A. Yes.

Q. It is all one outfit, although it has two names? A. Yes.

(Testimony of Graham Magee.)

Q. Do you know what States they are doing business in?

A. Their home office is in Kansas City, and they are in the States going south.

Q. Are you sure they are in those States?

A. Yes.

Q. They were there before you?

A. No, sir.

Q. In what States were they in before you?

A. I don't know of any.

Q. Isn't it a fact that you say they were there ten years before you discovered they were there?

A. That is my recollection.

Q. Are they in Kansas? A. Kansas, yes.

Q. And you are in Kansas?

A. I think they are in Kansas, I don't know. I don't know where their stores are located.

Q. Mr. Magee, do you mean to tell the Court—

A. I do not know whether they have any stores in the State of [126] Kansas.

Q. You know you have?

A. I definitely do.

Q. And you don't know whether they have stores in Kansas? A. I don't know.

Q. Then how do you know whether they were there before or after you got into Kansas, if you don't know? A. I don't know.

Q. Then your answer that they were there before you—

A. I said I had no recollection.

Q. Now, what is your recollection?

(Testimony of Graham Magee.)

A. I have no recollection.

Q. At this moment you have no recollection?

A. I don't know whether they have any stores in Kansas.

Q. And you don't know whether through the Middle West Lerner Stores Corporation, the plaintiff, or one of its subsidiaries has stores in the same trading area as "J. S.," or Lerner-Vogue?

A. I know they do have.

Q. You know they do have?

A. That's right.

Q. In the same trading area?

A. That's right.

Q. And then you don't know whether they were there before you, or after you?

A. I don't know.

The Court: You mean there is not a single case you can tell us in these dates whether or not your store was there before them?

A. Surely; I know in San Antonio, Texas, we were there first.

Q. Is there any place you can say they were located before you? A. No. [127]

The Court: Q. But you had litigation against them?

A. We brought suit against San Antonio, Texas, and kept them out.

Mr. Robinson: Q. These other places, you don't know whether they were near you, or in your trade area, and you brought no litigation against them and they brought no litigation against you?

(Testimony of Graham Magee.)

A. I don't know where they opened those stores.

Q. How far is Topeka from Kansas City?

A. I don't know.

Q. How far is Wichita from Kansas City?

A. I don't know.

Q. Can you give me an approximation?

A. I am guessing; Wichita may be a hundred miles from Kansas City.

Q. You travel that area?

A. I travel all over the United States.

The Court: Let us get on with this, gentlemen.

Mr. Robinson: Q. Do you consider Wichita in the trading area of Kansas City, where Lerner-Vogue has four stores?

A. I couldn't consider it so.

Q. If it is about 100 miles, it is about the same distance as Sacramento to San Francisco?

A. That's right.

Q. Do you consider Sacramento in the trade area of San Francisco?

A. I would say people in Sacramento trade in San Francisco.

Q. Your Market Street store does considerable business with people from Sacramento?

A. I wouldn't say "considerable business." They do some business.

Q. You would say they do considerable business in San Jose? A. They do business. [128]

Q. Would you say it is considerable?

A. I wouldn't say.

(Testimony of Graham Magee.)

Q. Do you know how this Middle West firm is referred to by the public?

A. "J. S. Lerner-Vogue."

Q. You mean when a customer in Kansas City, or in Texas, or in any other place where they have a store, refers to that store, he refers to it as "J. S. Lerner-Vogue."

A. They probably call it "Lerner-Vogue."

Q. Lerner-Vogue? A. That's right.

Q. They wouldn't call it "Lerner," would they?

A. That is what we are trying to stop.

Q. I mean, if I, as a customer, were referring to a certain one of four stores in Kansas City where I bought some merchandise, what do you think, or how do you suppose I would refer to the shop?

A. Lerner-Vogue.

Q. And you say that because the store is advertised as "Lerner-Vogue," is that right?

A. That's right.

Q. And your stores are advertised as "Lerner Shops," are they? A. That's right.

Q. Without variation?

A. That is correct.

Q. And as a matter of fact, has not some effort been made by your firm to implant the idea that "Lerner" and "Shops" go together, and I am referring to the plural? You always have the plural, never the singular?

A. That's right.

Q. Even if you have one store in a city you have the word "Shops?" A. That's right. [129]

(Testimony of Graham Magee.)

Q. Have you not made some effort to create an association of ideas so that the phrase, "The Lerner Shops" or "Lerner Shops" will be used, so that the word "Shops" will always be a part of the name?

A. Our trade name is "Lerner Shops."

Q. You have on some occasions taken steps to encourage the use of that?

A. I don't know what you mean.

Q. I mean, so that people, just as they refer to "Lerner-Vogue" and not to "Lerner's," according to you, or to "J. S. Lerner-Vogue," and not to "Lerner's," or to "Vogues;" you have also taken some steps to see that people refer to you as "Lerner Shops?"

A. No, they refer to us as "Lerner's."

Q. I didn't ask you that.

A. We have taken no steps other than have the name on our stores, "Lerner Shops."

Q. Why do you say they refer to you as Lerner's? Don't you refer to "Lerner-Vogue" as "Lerner's?"

Mr. Goldberg: I object to that as argumentative.

The Court: Of course it is. The Court is able to draw its own conclusion from the facts here.

Mr. Robinson: All right.

Q. Mr. Magee, you are quite familiar with the San Francisco Market store, aren't you?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 1, which is

(Testimony of Graham Magee.)

a photograph of that store, and call your attention to a central column. You observe that, do you not? A. Yes.

Q. Do you remember the inscription that was on both sides of [130] that column, in metallic rays, likewise about four inches high, about the time of the commencement of this action, and for several months thereafter?

A. The only thing I can testify is as to what is there now. I don't know what was there four months ago. Someone may have changed that.

Q. That is what actually happened. Someone changed that? A. I don't know.

Q. And wasn't there the words on there, "This is the Lerner Shop?"

A. I do not know that.

Q. You do not know that? A. No.

Q. And you don't know that it was changed after that fact was mentioned in a pre-trial conference in this courtroom?

A. I do not know that.

Q. And you do not know that now the language is a little bit different, and there is a temporary sign put over that language?

A. I looked at it yesterday as I walked in the store, and it looked like a permanent sign.

Q. Did you make a note of whether it was a permanent sign?

A. It looked permanent to me.

Q. What did it say?

A. It said, "Lerner Shops," and it described

(Testimony of Graham Magee.)

the merchandise we sell there. I made no minute inspection.

Q. I hand you a picture of that column.

A. Yes.

Q. Is that a bronze sign, Mr. Magee?

A. That is very difficult to ascertain from this photograph. [131]

Q. What did you ascertain when you looked at it? A. It looked to me like a bronze sign.

Q. Isn't it a bronze frame with a card?

A. I looked at it yesterday.

Q. The textual material is on a card?

A. Yes.

Q. You didn't mean to indicate it was a bronze sign yesterday?

A. No, I meant it was a bronze frame.

Q. Under that sign there is underneath the sign the words "This is the Lerner Shop."

A. No, I don't know that.

Mr. Robinson: We will offer this as defendant's Exhibit first in order.

The Court: All right.

(Photograph was marked Defendant's Exhibit A.)

The Court: Anything else with this witness?

Mr. Robinson: We will be through with him very shortly, your Honor. I asked about the Lerner Blouse Company, and I hand you now page 12 of a trade paper, called, "Shortswear," or rather, "Women's Wear Daily," dated February 21, 1945, and I call your attention to the upper

(Testimony of Graham Magee.)

left-hand corner, where there is an ad which says, "Lerner, the House of Personality," and the signature under the ad is "Lerner Blouse Company."

A. That's right.

Q. That is one of your firms?

A. No, it isn't.

Q. That is a New York firm that sells blouses to the retail trade?

A. No, the Lerners have a cousin, Ben Lerner, in the [132] blouse business.

Q. You made no efforts to put him out of business, did you?

Mr. Goldberg: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Robinson: We offer this as Defendant's Exhibit B.

Mr. Goldberg: I object to that, if the Court please, on two grounds.

The Court: I will sustain the objection on whatever ground you have. I think it is immaterial. Counsel may have it marked for identification.

(Page 12 of trade paper, "Women's Wear Daily," dated February 21, 1945, marked Defendant's Exhibit B for Identification.)

Mr. Robinson: Q. Now, Mr. Magee, among the things which you called advertising, and you recall you said store fronts, window background pictures, tickets in the windows with the name on, the physical layout, you said your store windows

(Testimony of Graham Magee.)

were characterized by what is called a billboard sign?

A. That's right.

The Court: He has already answered that. Why go over it again?

Mr. Robinson: Just one other question, your Honor:

Q. The billboard sign is not peculiar to Lerner's? A. We were the first ones to use it.

Q. But everybody else is using it now?

A. A number of our competitors are using it now.

Q. A number of your competitors are using it now? A. That's right.

Q. In other words, right up and down that same block, Zukor uses it, Grayson uses it, Hale Bros. uses it; I believe the two shoe companies use it. What you mean by billboard is the name of the firm in large letters against a background of some kind?

A. The front of the San Francisco store is a billboard front.

Q. Grayson also has a billboard front?

A. They have a temporary setup.

Q. But it is a billboard front, made up of war materials? A. I think it does.

Q. It runs higher than yours?

A. I think it does.

Q. Zukor's has one like yours?

A. I don't recall; he has a store, but I don't know what kind of a sign he has.

(Testimony of Graham Magee.)

Q. Don't you know he has a white marble background, just like yours? A. No, I don't.

Mr. Robinson: That is all.

Q. Oh, just one other question, Mr. Magee. Do you identify this sign? I better show it to Mr. Goldberg. (Photograph shown to Mr. Goldberg.) Do you identify that sign, the word "Lerner?"

A. Well, it says "Lerner."

Q. Can you identify it as one of yours?

A. It is my opinion it is not. [134]

Q. Does it resemble yours? A. No.

Q. It is a billboard sign, is it not, with the word "Lerner" in block letters? A. That's right.

Q. In conventional block letters?

The Court: Q. Well, you can't identify it?

A. No.

The Court: Ask the next question.

Mr. Robinson: Q. You don't know where that sign is? A. No, sir.

Q. Or where it has ever been? A. No, sir.

Q. Suppose I hand you part of the photograph with the word "shop" on it, and put it under that. Can you identify it now? A. No, sir.

Q. If there was a sign that size in the neighborhood of one of your principal stores, you would know about it, wouldn't you?

Mr. Goldberg: May we inquire as to what size counsel is talking about? The photograph doesn't indicate the size.

Mr. Robinson: I will give you the size. The area represented by this photograph is over 8x10 feet.

(Testimony of Graham Magee.)

The Witness: What is the question?

Mr. Robinson: Q. The area represented by that photograph, 8x10 feet, and the letters are over one foot high.

A. What is the question?

Q. If there was a sign that size in the neighborhood of one of your principal stores, you would know it, wouldn't you?

A. What sign, with the combination? [135]

Q. With or without, either way, the word "Lerner," a word in which you are greatly interested?

A. It all depends what business this tenant would be in. There is Lerner carpet stores and "Lerner Hat Shops."

The Court: You are referring, I suppose, to one of his stores?

Mr. Robinson: Not to one of his particular stores. I am referring to a neighboring store that handles items that he handles. He told us yesterday there was no store on the West Coast handling the goods he handles.

The Witness: I meant coats, dresses and suits.

Q. By other stores?

A. There is a men's hat shop called "Lerner." It is called "Lerner Millinery." I believe there is a carpet shop called "Lerner." I believe there are no others.

Q. Do you handle hats? A. Yes.

Q. Where is that hat store you mentioned?

A. On Mission street.

(Testimony of Graham Magee.)

Q. Exactly two blocks from your place of business? A. Yes.

Q. That sign is from that store.

A. I paid no attention to that.

Q. You know about it?

A. I paid no attention to that.

Q. I suppose that no one ever came in to you, exchanging a hat with you that they bought up the street, did they? A. I wouldn't know that.

Q. You wouldn't know that? A. No. [136]

Mr. Robinson: Will it be stipulated that this is the store at 1025 Market Street depicted in this picture, within two blocks of your store?

Mr. Goldberg: I can't stipulate to that. I don't know anything about it.

Mr. Robinson: We will show that. That is all.

#### Redirect Examination

By Mr. Goldberg:

Q. On those stores we have heard so much about in the Midwest, you said under an agreement some stores were called by a name other than Lerner's?"

A. Yes, "Joan-Eddy." That has become their trade name and they have agreed to market their merchandise under that name in all stores.

Mr. Goldberg: That's all.

The Court: That's all, step down, Mr. Magee.

Mr. Goldberg: Mr. Silverman, please.

MILTON SILVERMAN,

called as a witness by Plaintiff; sworn.

The Clerk: Will you state your name to the court, please?

A. Milton Silverman.

Direct Examination

By Mr. Goldberg:

Q. Mr. Silverman, what is your occupation?

A. I am the manager of the Lerner Shops at 831 Market Street, and the supervisor of the store at 220 Grant Avenue.

Q. Of Lerner's? A. Lerner's. [137]

Q. How long have you been employed by the Lerner Stores Corporation, or any of its subsidiaries? A. Approximately nine years.

Q. How long have you served—

Mr. Robinson: I think we ought to know which subsidiaries he is working for.

The Court: Don't interrupt so much, please, counsel. Every time you do it leads to a speech and an argument. If you have an objection, make it. You gentlemen are experienced lawyers and you are taking too much of the Court's time in a case with a simple issue to it. Again, I say at the risk of calling for your criticism, it is getting tiresome. Let's get on with the case.

Mr. Goldberg: Q. Mr. Silverman, how long have you been employed in your present position?

A. Two and a half years.

Q. Prior to that time where were you employed?

(Testimony of Milton Silverman.)

A. I was with the same organization in Cleveland.

Q. In what capacity?

A. Managing the Lerner Shops in Cleveland for approximately four and a half or five years.

Q. Prior to that time what sort of work did you do for the company?

A. Prior to joining Lerner's?

Q. No, prior to going to Cleveland.

A. I had the Syracuse store for a year.

Q. Can you tell us what items of merchandise the stores handle here in San Francisco?

Mr. Robinson: There is no dispute about that.

The Court: It has already been covered.

Mr. Goldberg: If the Court please, it is an important matter, I think, from the standpoint of unfair competition.

The Court: You have another witness already who has testified to that. It doesn't need any corroboration. The secretary testified in great detail as to the articles that were handled.

Mr. Goldberg: Then my next question of this witness is the range of price at which these items you handle are sold.

A. They are popular-priced. Do you want me to name each one?

Q. Yes, the range.

A. We can start with our blouse department. We carry blouses from a dollar to \$6.95. We carry sweaters from \$1 to \$6.98; we carry skirts from \$1.98 to \$7.98; we carry slacks from \$1.95 to \$6.98;

(Testimony of Milton Silverman.)

we carry slack suits from \$3.95 to \$14.95. We carry lingerie starting with slips that range from \$1.29 to \$5.98; gowns from \$1.98 to \$5.98.

Q. By "gowns" you mean nightgowns?

A. Nightgowns. We carry hosiery, ranging in price from 50 cents to \$1.35. In our dress department we carry dresses from \$4.95 to \$29.95, depending upon the season. In our coat department, we carry coats from \$9.95 to \$79.95.

Q. While you are on coats, you have both fur-trimmed and untrimmed?

A. All right; we carry untrimmed coats from \$9.95 to \$39.95; and we carry fur-trimmed coats, \$24.95 to \$79. In our suit department we carry suits from \$6.95 to \$39.95. [139]

Q. Does that about cover the items?

A. Approximately.

Mr. Robinson: Mr. Goldberg, I wonder, so I won't have to ask him later, as I intend to question him on these, if you could repeat them? I couldn't keep up with him. He mentioned furs?

A. No, I did not. We carry fur coats from \$39.95 to \$79. We carry separate fur collars, \$24.95 to \$29.95.

Mr. Goldberg: Q. Millinery?

A. Hats, 95 cents to \$4.95.

Q. Handbags: A. Handbags, \$1.95 to \$9.95.

Q. Do you personally spend any time on the selling floors of either of these stores?

A. I would estimate I spend about eight per cent of my time on the floor.

(Testimony of Milton Silverman.)

Q. Of which store?

A. Market Street store.

Q. Do you know where the customers of that Market Street store come from?

A. I would know where some of them came from.

Q. How do you determine that?

A. There are any number of ways. I O.K. a good part of the checks in the store. That would be one way. I also handle adjustments. That would be another way. From being on the floor I also see customers that continue to come back and you work up a talking acquaintance with them.

Q. With reference to checks and adjustments in those cases, does that include exchanges?

A. Yes, exchanges or refunds; or if something wouldn't wear well, I would handle it.

Q. In those cases you would get the names and addresses of the customers? A. That's right.

Q. And in other cases you talk with the customers on the floor? A. That's right.

Q. From the various means you have described, can you tell us where the customers in that store come from, the general area?

A. Well, the bay area. They come from down the Peninsula and they come from Sonoma and Marin County. There isn't any one specific area.

It is pretty spread out.

Q. With respect to the area between San Francisco, to and including San Jose, can you tell us, or have you any knowledge or any way of know-

(Testimony of Milton Silverman.)

ing or determining how many customers in any particular period you get from that area?

A. Well, there would be no accurate way, but I would say it would be substantial.

Q. Do you keep a record of exchanges?

A. Yes, we do.

Q. And those determine the nature—— Have you made a search of your records for any particular period? A. We have.

Q. For what period?

A. We took the credit slips for the period of July, 1944, to March of 1945.

Q. Both months inclusive? A. Yes.

Mr. Robinson: What period?

Mr. Goldberg: From July, 1944, to March, 1945.

Q. With respect to customers between, say, Burlingame and San Jose, have you determined how many of those have made exchanges during that period?

A. It wasn't Burlingame we took. We felt Burlingame was too close. We took San Mateo, and from south of San Mateo to San Jose there were approximately 300 transactions [141] during that period.

Q. Can you tell us approximately what percentage of your sales result in exchanges of this kind?

A. Between 6 and 7 per cent.

Q. Six or 7 per cent of what?

A. Six or 7 per cent of our total volume. That wouldn't necessarily mean customers, for the sim-

(Testimony of Milton Silverman.)

ple reason that if a customer bought three dresses and she exchanged one—

Q. So that in any event it represents 6 or 7 per cent of all of your transactions involved in these exchanges? A. That's right.

The Court: You mean that the exchanges represent 6 per cent of all the transactions, is that what you mean?

Mr. Goldberg: I think that is what the witness means, in volume.

The Court: It wasn't clear to me. You didn't mean that 6 or 7 per cent of the transactions were from San Jose, itself? A. Oh, no.

Mr. Goldberg: Q. Six or 7 per cent of credit transactions or exchanges, transactions generally —withdraw that. Of all of the business done, about 6 or 7 per cent result in exchanges of one kind or another?

The Court: He said, of that group about 300 transactions were south of San Mateo.

Mr. Goldberg: That's right.

The Court: What you are trying to bring out now is what [142] percentage that is of 6 or 7 per cent.

Mr. Goldberg: My question is now a matter of deduction, purely, that of their total business, 6 or 7 per cent, from their experience results in exchanges, that that means that roughly 300 would be 6 or 7 per cent of the business they actually do between San Mateo and San Jose.

(Testimony of Milton Silverman.)

The Court: You better ask the witness what that 300 represents in percentage.

Mr. Goldberg: Yes.

Q. Can you tell us, Mr. Silverman, of these transactions between San Mateo and San Jose, which resulted in exchanges, what percentage was that of all the business that you did in the same period between San Mateo and San Jose?

A. If I remember correctly, there were approximately 263 transactions that I actually checked. Taking those transactions, I found a monthly average of the number of people in that specific area that exchanged merchandise in our store. In that way I got a monthly average, and from that it was easy enough to determine, that is, in other words, if 7 per cent, if that figure occurred, 7 per cent, it was easy enough to find 1 per cent, and approximately the 100 per cent, that is, the total number of people from that area that came to our store.

Q. And what was that determination?

A. 451 plus.

Q. Customers? A. Per month.

Q. From that area?

A. From that area. [143]

The Court: Have you any figures to show what the total number of customers is?

A. In our store?

Q. Yes. A. No, sir.

Mr. Goldberg: Q. You don't keep a record of individual customers?

Mr. Robinson: We move to strike all this testi-

(Testimony of Milton Silverman.)

mony on the ground it is wholly irrelevant, because we don't know what 450 is, what percentage of what? A. Well——

The Court: Just a minute, Mr. Silverman. Counsel, that goes to the weight. I will overrule the objection.

Mr. Goldberg: That's right.

Q. You could determine the number of transactions in the store in a year?

A. Very easily.

Q. But you wouldn't know the number of individual customers represented by those transactions? A. That's right.

Q. You would only know that with respect to those customers who have given you checks, or those who have made exchanges?

A. That is correct.

Q. Or those who buy on some lay-away plan, where you get the name and address?

A. That's right.

Q. The ordinary cash sale, you just get the cash and deliver the merchandise, without any record of the person? A. That's right.

Q. Mr. Silverman, in your period on the floor, do you hear any [144] of your customers refer to the store or the company by any particular name?

A. They refer to us as "Lerner's."

Mr. Robinson: Just a moment. I move to strike that until the question is asked. You merely asked if he hears.

(Testimony of Milton Silverman.)

The Court: I will allow the answer to stand. It is obviously responsive.

Mr. Goldberg: Q. In addition to references by customers to the name, you say you receive checks from customers? A. We do.

Q. And can you tell us what the procedure is usually when a customer is about to make—

The Court: Can't you shorten this, Mr. Goldberg? Maybe counsel will stipulate you receive certain checks and letter addressed to "Lerner's"?

Mr. Goldberg: Well, I have here some checks which I will show counsel. Some are originals that are not yet deposited, and other are photostatic copies made before they were deposited.

The Court: Can't we shorten this, gentlemen, by entering into a stipulation that the plaintiff's store receives letters and checks addressed to Lerner Shops and Lerner's and other designations?

Mr. Goldberg: Yes, and I would like to have this testimony, if the Court please, that the usual procedure of a customer about to give a check is to ask the person on the floor, or [145] the department manager how to make out the check.

The Court: All right.

Mr. Goldberg: Q. Is that the way it is done? They ask either you or the department manager how to make out the check?

A. That is correct.

Q. Can you tell us how that request usually is made?

(Testimony of Milton Silverman.)

A. Well, the usual question is, "Shall I make it out to Lerner's?"

Q. And what is that customer told when he asks that question?

A. They are told to make it out to "Lerner Shops."

Q. In spite of that, there are customers who make out the checks without asking the question?

A. There are any number of regular customers who make out their checks before I reach them.

Q. Where checks are made out without asking any questions, how are they generally made out?

A. I am sorry. Ask that question again.

Q. When checks are made out without asking any question, how are they generally made out?

A. I would say the bulk of them are made out to "Lerner's."

Q. Now, I will show you some original checks—

The Court: How could this witness possibly know such a negative fact as that? I am not trying to cut you off.

Mr. Goldberg: We inquired into it, and this is what we found by talking to Mr. Silverman and the department heads, and that is when customers—

The Court: I don't see the materiality of the mental [146] processes the customers go through. I understood counsel will stipulate once in a while checks are made out to "Lerner's" and once in a while checks are made out to "Lerner Shops."

Mr. Goldberg: I know, but we say our business

(Testimony of Milton Silverman.)

is known in the minds of the public as "Lerner's," and therefore customers who use their own idea of our name make out their checks as "Lerner's"; and if they ask how to make it out, they are told, "Lerner Shops." That is the purpose of the examination.

Mr. Robinson: I move to strike it all on the ground I have previously stated. I object to anything further in the way of testimony about what was in the minds of the public.

The Court: That's right. We have firms like I. Magnin & Company. I have made out checks to Magnin frequently.

Mr. Goldberg: If you were making out your check for Joseph Magnin, though, you would make it out, not for Magnin, but for Joseph Magnin.

The Court: I am not sure of that, Mr. Goldberg. I don't know whether you would, or not. I don't see that would help the Court in knowing what the mental processes of the public are. I have no doubt that many people, and to save time I will assume probably speak of it as "Lerner's" and make out checks to it as "Lerner's."

Mr. Robinson: I will stipulate, as I did in the pre-trial conference, the manner in which people refer to it. The possessive is used. Judge Goodman's name is Goodman, but [147] when people eat at his house, they say, "I ate at Goodman's."

The Court: Let us not argue. Do you stipulate that some people make out checks as "Lerner's"?

(Testimony of Milton Silverman.)

Mr. Robinson: I will so stipulate.

Mr. Goldberg: Some, yes, but I think it ought to be shown that is a substantial part, and the number of these checks mathematically, in proportion, would have some bearing as to whether only a few called it "Lerner's," or whether the majority of the people who come in there, without knowing how large a majority, refer to it as "Lerner's." I will be glad to ask that question of the witness and we can rest that part of the case.

The Court: All right.

Mr. Goldberg: Q. Mr. Silverman, first with respect to how the people in the store refer to it, would you say that the majority refer to it as "Lerner's?" A. Definitely.

Q. With respect to those who make out checks, who don't get an instruction, would you say the majority make it out as "Lerner's"?

A. I would say a good portion of them do.

Q. Mr. Silverman, could you tell us with respect to the items of merchandise that you carry in your Market Street store, or the Grant Avenue store, that bear a particular price, now that compares with the price that that same merchandise is sold in other stores on Market Street?

A. We under-sell them.

Q. Can you give us an approximation of the extent?

A. Well, our \$7.95 dresses are sold in the Emporium for \$8.98 and \$9.98. [148] We have coats

(Testimony of Milton Silverman.)

in our store at \$18.95 that are sold by our competitors from \$19.00 to \$22.95.

Q. Would you call the merchandise that is sold in your store on Market Street or on Grant Avenue as "Low end" merchandise?

A. We are a popular-priced organization.

Q. Have you personally had any contacts with persons coming into the store who have referred to the defendant's store in San Jose?

A. I have.

Q. Can you tell us when and what?

A. Well, on quite a few occasions I remember being called over by a salesperson, or one of our assistant managers, and I have had to correct customers about the impression they were laboring under, which is that the organization in San Jose was not a part of ours.

Mr. Robinson: I object to that on the ground it calls for the opinion and conclusion of the witness. If the answer is read back your Honor will see.

The Court: I think that part of the answer where he said he had to correct the impression may go out.

Mr. Goldberg: Q. Tell us more specifically in substance what was said to you by the persons in question, and what you said?

A. Specifically, in the course of the conversation the customer would say he was, he would say, "I was in your store in San Jose." I would say, "We have no store in San Jose." She would say, "But I was in your store in San Jose." So then

(Testimony of Milton Silverman.)

I would go on to explain to her about that, that we didn't have [149] one, but sometime in the immediate future we would.

Q. Did that happen on more than one occasion? A. It did.

Q. Can you tell us when, approximately, was the last time? A. Tuesday of this week.

Mr. Goldberg: That is all.

#### Cross-Examination

Mr. Robinson: Q. Mr. Silverman, did you give instructions to your girls to call you over every time an incident like that arose? A. I did.

Q. And each time did the person repeat to you, "I was in your store in San Jose"?

A. To a great extent.

Q. What do you mean by a great extent?

A. I mean they wouldn't say the exact same words you quoted, but it would have approximately the same meaning.

Q. In other words, after this litigation started, you instructed your sales girls that any time any incident arose which indicated to you that a customer believed that a certain store in San Jose was one of Lerner Shops you would be called over?

A. That's right.

Q. How many times were you called over since June, 1944?

A. I have no occasion to remember that amount. It was quite often.

Q. Once a week?

A. I would say it was oftener than that.

(Testimony of Milton Silverman.)

Q. How often? A. I don't know.

Q. You can't say whether it was twice a week?

A. It was oftener [150] than twice a week; but, as I say, I have kept no records.

Q. You knew there was litigation pending, didn't you? A. I did.

Q. And you didn't keep records?

A. No.

Q. And you didn't make any estimate of the number of times you were called over?

A. No.

Q. And the last time was last Tuesday?

A. Yes.

Q. Did you say that the substance of the conversation was, the customer would say, "I was in your store in San Jose," and you would say, "That is not our store"? A. That's right.

Q. You say you made a monthly average of these exchanges? A. That's right.

Q. Do you have the figures here?

A. No, I had them on my lunch hour, but they are available.

Q. You made no schedule of them, did you?

A. No.

Q. Do you remember generally whether the number of exchanges from that area increased progressively from last June until July—I think the closing date is the 31st of March?

A. I don't understand your question.

Q. In other words, you went over them on a monthly basis, is that right?

(Testimony of Milton Silverman.)

A. That's right.

Q. And each month the number would be different?

A. No, I didn't take it that way. Our credit books contained 50 transactions, so I just instructed one of my cashiers to pull out the exchanges and credits for that particular period. When she did that I had a total, which I divided by the number [151] of months for an average monthly average.

Q. Oh, I see. You didn't take it by months, but you got the total of that period, and how many exchanges did you get from that area for that period? A. I think 263.

Q. Then you took that and multiplied—You assumed that to be 7 per cent?

A. That's right.

Q. Of course, it is the transactions from that area, or total dollar volume?

A. Number of transactions.

Q. From that area; and then you got 100 per cent from that area? A. That's right. [151a]

Q. Then from that 100 per cent, from San Mateo to and including San Jose, you got 450 customers a months?

A. It is between 400 and 450 a month.

Q. You don't know what portion of them come from San Francisco? A. No.

Q. You don't know what proportion of them come from Palo Alto? A. No.

Q. You don't know what proportion of them come from any other communities in that area,

(Testimony of Milton Silverman.)

such as, I might mention, Cupertino, Los Altos, Los Gatos?      A. That's right.

Q. What area did you take in?

A. San Mateo south, including San Jose.

Q. That included Los Altos?

A. That's right.

Q. You don't know whether there were more in March than there were in July, or vice versa?

A. I do not.

Q. You don't know whether the number of customers has increased or decreased from that area?

A. I don't.

Q. Mr. Silverman, you are familiar with that department store which also has a branch in San Jose, Hale's?      A. I am.

Q. And you refer to it that way, don't you, and so do your customers?

A. I haven't had any occasion to refer to it. What do you mean?

Q. Well, how do you refer to that outfit I referred to?      A. I imagine Hale's.

Q. You know what the name of it is?

A. Hale's. [152]

Q. It is Hale Brothers, isn't it?

A. That I don't know.

Q. For what subsidiary are you now working?

A. Lerner Shops of California.

Q. You are working for Lerner Shops of California?      A. I am.

Q. You heard Mr. Magee say your mark-up was one-third, based on selling price?

(Testimony of Milton Silverman.)

A. He said it was approximately 33 1/3 per cent.

Q. Is there a difference between one-third and 33 1/3 per cent?

A. I just wanted to quote Mr. Magee exactly.

Q. That is based upon selling price, is that correct? A. Based upon retail.

Q. And you said that you didn't undersell everybody, or did I understand you correctly?

A. Well, that is pretty broad. We undersell most of our competitors.

Q. I see. Isn't it a fact that you and Zukor's sell for about the same price?

A. That is not so.

Q. Is Zukor's higher than you?

A. Yes.

Q. By how much?

A. By 10 to 15 per cent.

Q. Then their markup would be between 40 and 45 per cent?

A. Well, that is simple arithmetic.

Q. Well, you wanted to be so precise.

Mr. Goldberg: That is assuming they both start with the same cost.

Mr. Robinson: Well, everybody knows what mark-up is. You asked him, and I didn't ask for a dictionary definition. The basis of [153] calculation, as I take it, on the way they figure these stores, it is one thing if they handle higher priced merchandise; if you buy something for \$100 and sell it for \$150, you are in a higher price range in one respect. If you buy something for \$10 and

(Testimony of Milton Silverman.)

sell at \$12, you are in two low categories, one with respect to selling price and one with respect to mark-up.

Q. Now, with respect to mark-up, you and Zukor's handle many items in the same classification?

A. We carry the same coats, suits, and dresses.

Q. Will you give me an example of an item that you would sell for any price—take, for example, what would you sell a dress for?

A. For example, print jersey dresses which they have had, our price was \$7.95, which they had at \$8.95.

Q. Would you say generally Zukor is higher than you? A. I would say so.

Q. Is that true of Grayson?

A. I would say Grayson is more competitive?

Q. You would say Grayson is more competitive?

A. Yes.

Q. In other words, Grayson is still a little higher than you?

A. I wouldn't say so. They are pretty close.

Q. Then their mark-up is somewhere in the neighborhood of 30 per cent. Can you name anyone else who is pretty close? A. No.

Q. You and Grayson are in one classification, and there is no one pretty close. You gave a price range here. As of what year [154] did you give that?

A. I didn't have any specific period. I was covering no specific period. Prices in the spring vary with prices in the fall.

(Testimony of Milton Silverman.)

Q. Mr. Silverman, you are familiar with OPA Regulation No. 330? A. I am.

Q. Was it or was it not higher than when it was in existence?

A. It is one that controls your ceiling prices.

Q. You mean first No. 330 was called the highest price line regulation? A. That is right.

Q. You remember that?

A. That is right.

Q. Will you please tell us what that was?

A. It was one that limited the highest price line we could carry in a specific store.

Q. In other words, if you had dresses and your top dress was \$29.95—is the figure you have here—do you remember at that time what your highest price was? A. No, I do not.

Q. It was not \$29.95, was it?

A. I don't know.

Q. Well, what was it? A. I don't know.

Q. You know you went into a higher price line since then?

A. At the time that went in, I was in Cleveland at the time, and our price lines vary in different stores.

Q. When was the highest price line considered?

A. I think it was March, 1941.

Q. When was it revoked?

A. I don't know.

Q. Do you mean to say as manager of Lerner Shops in San [155] Francisco and in charge of

(Testimony of Milton Silverman.)

things like this you can't tell us when the highest price line regulation was revoked?

A. That's right.

Q. You know it was revoked?

A. Definitely.

Q. Within two years since you have been with the San Francisco subsidiary?

A. I do not.

Q. What was that? A. I do not.

Q. Is it not a fact that it was revoked sometime in the latter half of 1944?

A. I don't know.

Q. Is it not a fact that your price ranges increased substantially as soon as that regulation was released? A. I would say no.

Q. Is it your testimony that your price range of blouses before the change in the regulation was \$1 to \$6.95? A. No.

Q. What was it before?

A. I don't remember.

Q. And how about sweaters? You have here \$1 to \$6.98. What were they before the rule was released?

A. I am guessing, but I would say \$5.98.

Q. But that is a guess? A. Yes.

Q. But there was a difference?

A. There might be.

Q. And skirts—you have your price range \$1.98 to \$7.98? A. That's right.

Q. Was it different before?

(Testimony of Milton Silverman.)

A. I really don't know, because I have had no occasion to check them.

Q. You don't know. Would it be the same as to the other items [156] right down the line?

A. That's right.

Q. You are sure the range of coats has gone up, you say. You have top line, \$29 to \$79.95. You have never had that range?

A. I think our ceiling was \$59.95.

Q. And when the top price range was released, you went to \$79.95? A. We might have.

Q. Is it a correct statement that the top price range was a form of price ceiling, that it is a base ceiling and you cannot handle an item for a higher price than you handled it in the base period?

A. That's right.

Q. How about untrimmed coats? What was your top price then, before the regulation, if you know? A. I don't know.

Q. You think there was and you don't know what it was, or don't you think there was?

A. I think there was, but I don't know.

Q. There was a difference, but you don't know what it is?

A. There may have been some differences, but I don't know what they are.

Q. Consequently, the prices you have given were not in effect when the defendant opened his store?

A. I wouldn't say that.

Q. If the defendant opened his store before the relaxation of the rule, then that would be the case,

(Testimony of Milton Silverman.)

assuming it to be the fact that the rule wasn't relaxed when he opened his doors?

A. If that were so——

Q. You have your price ceilings as 1944 in your store, haven't you, showing the top price line?

A. We have. [157]

Q. And from time to time, as you add a new line you are required to file with the OPA?

A. Just a minute. We operate through central pricing, so I am not required to file anything. The information when I get it is all cut and dried.

Q. But you know it has been done?

A. I really don't know, because quite frankly, I am not familiar with the technical part of the operation.

Q. Do you have your ceilings in the store for 1944?

A. There is; but quite frankly, I haven't referred to it once since I have been in the store.

Mr. Robinson: Could I ask you to bring that book, particularly that part which would show the change over after the relaxation of the highest price line?

Mr. Goldberg: That is, assuming the book has anything like that in it. We will object to bringing whatever books we have and let you see what is in them.

Mr. Robinson: Q. Mr. Silverman, did you take the names of any of these people who said to you, "I was in your San Jose store," and you said, "No, you weren't," or words to that effect?

(Testimony of Milton Silverman.)

A. No, I had no occasion to.

Q. You did not? A. No, I did not.

Mr. Robinson: That is all.

The Court: Q. Mr. Silverman, you have been in business here for some time?

A. In San Francisco for a little over two years.

Q. I wanted to ask you this question: I suppose that people come from the outlying communities to San Francisco to trade. That is a part of the general public patronage here in San Francisco?

A. That is correct.

Q. And I suppose that all stores of any consequence get a certain amount of trade from the outlying cities? A. That's right.

Q. Lerner's, as well as other stores?

A. That's right.

Q. Have you any way of knowing or have you made any investigation to determine the percentage of total business that comes from outlying areas of San Francisco with relation to the amount of local patronage? A. No, sir, we haven't.

Q. Do you know anybody who has made that sort of a survey among the local merchants?

A. No, we don't.

Mr. Goldberg: I can answer that if the Court wants to know. The Chamber of Commerce have figures on surveys that have been made. I think one was made by the National Cash Register Company and others, and the general assumption of the Chamber of Commerce and department stores to whom I have talked in San Francisco is that about

(Testimony of Milton Silverman.)

75 per cent of their business comes from San Francisco and about 25 per cent from outside San Francisco.

The Court: That includes Oakland, too?

Mr. Goldberg: That includes the Bay Area and the Peninsula area, and of that figure about 9 per cent of the business comes [159] from the Peninsula area.

The Court: So, the Court can safely assume that if we were to break the outside area into its component parts, it would result in fractions of percentages coming from specified communities in the area surrounding San Francisco?

Mr. Goldberg: As I say, that figure is about 9 per cent, coming from the Peninsula area; that is, from San Francisco to San Jose, and that comes off the 25 per cent, the balance being from Alameda and Marin County and other areas.

The Court: This is not probably particularly evidentiary, but it is a subject matter that is not particularly disputable. Do you want to ask any other questions?

Mr. Robinson: Mr. Goldberg, I haven't the slightest doubt in the world what you say is true, and if it is of any use, you can introduce it in evidence.

Mr. Goldberg: It is the best information I was able to get, but I wasn't able to get it in the form of admissible evidence, and that is the reason I didn't present it.

(Testimony of Milton Silverman.)

The Court: I don't think that would be a disputable matter.

Mr. Goldberg: I might say this: I have also made inquiries of department stores as to the number of accounts that come from particular areas, and their estimate based upon the fraction of their business that is represented by charge accounts, and it is only an estimate, that about 3 per cent of these major [160] department stores' business comes from San Jose. It wasn't in a form in which I could put it in evidence, so I haven't tried to present it; but I have gotten the best that the credit people in these stores could give me after checking their records.

The Court: I am rather surprised, as the casual observance a layman would give, that it would be that. The proportion of San Jose to the whole general area wouldn't be anywhere near that.

Mr. Goldberg: I will tell your Honor how that is arrived at. It is an estimate based upon actual charge accounts. The charge accounts run about one-third of their business. It is less now. It is purely an estimate, because it may be that more charge accounts would be allocatable down there. It is purely an estimate. That is why I haven't offered it.

Mr. Robinson: There would be more charge accounts in the outlying places than cash business, because the charge account is the kind of person who goes in and buys a lot of things and has it sent;

(Testimony of Milton Silverman.)

whereas a person who buys a blouse for a dollar isn't likely to be from San Jose.

The Court: I was just interested to see whether or not there had been surveys made. I would venture the guess that even if the surveys were made, the net result would probably be about the proportion of the relation of the population, generally speaking. [161]

Mr. Robinson: That couldn't be, your Honor, because that would exclude all the local business.

The Court: No, out of town.

Mr. Robinson: Take all the out-of-town business and divide it by the population. Yes, I would say that.

The Court: There is a certain percentage you could attribute to outside of San Francisco. The percentage of San Jose to the outside communities, taking that, you would find that business is fairly relatable to that proportion.

Mr. Goldberg: There are some factors that have to be taken into consideration. In Oakland you have several large outstanding department stores, such as Emporium-Capwell, who do a major portion of the business.

The Court: Aren't we sort of prematurely arguing?

Mr. Robinson: I was going to mention San Jose has Hart's and Hale's. I would say from here to San Mateo you have a large commuting area.

The Court: I think the Court can take judicial

(Testimony of Milton Silverman.)  
notice of the general locale. I wanted to know whether or not there had been a survey made.

Mr. Goldberg: I started to inquire among the real estate people, and they have a certain rule of thumb, bases they go by, but they get it second or third hand, and I couldn't use that.

The Court: Q. Mr. Silverman, in line with this general [162] examination, about how far north in the communities north of here do you know that people trade in your store on Market Street?

A. We get them from Sonoma County.

#### Redirect Examination

Mr. Goldberg: Q. What about Red Bluff? I simply have here a check that is payable on a bank in Red Bluff. Do you recall you have customers from that far away?

Mr. Robinson: This is all very interesting, Mr. Goldberg, but we have checks in our store for Black Hills, South Dakota.

Mr. Goldberg: Q. What about Sacramento?

A. We do.

Q. What about Watsonville and Salinas?

A. We have customers from all that section.

Q. You were asked whether you could tell from your examination of the credit slips which you analyzed came from Palo Alto or Redwood City or San Jose. A. We can.

Q. I will hand you some of the slips out of the group you gave to me, and see if you can determine here—perhaps we can stipulate that the number we have here would add up to a certain amount.

(Testimony of Milton Silverman.)

I might say I have personally added these marked "Redwood City," and there are thirty-one of those. There are thirty even from Palo Alto. There are thirteen from San Jose. And I would like to have these in evidence.

The Court: You don't want to encumber the record?

Mr. Robinson: The figures will suffice for the record.

The Court: Will you accept counsel's statement? [163]

Mr. Robinson: Yes.

Mr. Goldberg: I would like to have the record show if those are carbon copies of the original exchange slips of Lerner Shops during the period from July 1, 1944, to March 31, 1945, with the names and addresses of the customers and segregated among the three communities I have mentioned. I assume those are all, and I know there are at least that many.

Mr. Robinson: Would it be of some interest to show whether or not the amount before Wilfred Lerner opened up and practically threatened you with bankruptcy is more or less since he opened up?

Mr. Goldberg: That can be. I didn't make this examination.

The Court: All right. Are you willing to stipulate to that?

Mr. Robinson: Yes.

Mr. Goldberg: Very well.

The Court: Anything else of this witness?

(Testimony of Milton Silverman.)

Mr. Goldberg: I think not.

The Court: Q. Would you say that store does any greater proportion of out-of-town business than any other normal store in San Francisco?

A. I would say not.

Q. It would be about the same as the general run of good mercantile establishments?

A. Exactly.

Mr. Goldberg: Q. Do you get many customers who do [164] business in other Lerner stores in other parts of the state or the country?

A. Yes.

Mr. Goldberg: That is all.

Mr. Robinson: That is all.

The Court: We will recess until two o'clock this afternoon.

(Thereupon a recess was taken until 2:00 p.m.  
this date.)

Friday, April 27, 1945, 2:00 p.m.

JESSIE SHELTON,

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court, please.

A. Jessie Shelton.

Direct Examination

Mr. Goldberg: Q. Mrs. Shelton, what is your occupation?

A. Coat and suit department manager.

(Testimony of Jessie Shelton.)

Q. Coat and what? A. Suit.

Q. Department manager? A. Yes, sir.

Q. For whom do you work?

A. The Lerner Shops.

Q. Where? A. 833 Market Street.

Q. In San Francisco?

A. San Francisco.

Q. How long have you had the position as manager of that department?

A. About six years.

Q. How long have you worked in that store?

A. Going on ten years.

Q. With reference to the time when the store was opened, when did you go to work there?

A. Three days before the store was opened.

Q. And you have been continuously there all that time? A. Yes, sir.

Q. Before you worked in the Market Street store did you work in any other Lerner store?

A. Our Lerner shop in San Diego. [165]

Q. And had you been in the same line of business before that? A. Yes, sir.

Q. By what name is that store referred to by your customers in your hearing?

A. Well, I would say mostly "Lerner's."

Q. Do you know where your customers come from, that is generally where their homes are?

A. Well, just from conversation, where they tell us they are from.

Q. From that can you tell us if you have any customers outside of San Francisco?

(Testimony of Jessie Shelton.)

A. Quite a few.

Q. Can you tell us generally from what areas they come?

A. Well, from all outlying districts.

Q. Would you say in all directions, north and south and east?

A. In the Bay area, all around—Ukiah and all of those districts.

Q. With reference to the area between San Francisco and San Jose, and including San Jose, do you know whether you have any customers in any of that area? A. Yes, we have.

Q. In what communities?

A. Well, in Palo Alto we have quite a few customers, Redwood City, Burlingame, San Jose.

Q. When you say you have quite a few customers, are those people who have come in and bought on isolated occasions, or is that something happens more or less continuously?

A. I think it is continuously.

Q. Have you had any persons in the store who have mentioned to you a Lerner store in San Jose?

A. Yes, sir. [166]

Q. Can you tell us about when that took place?

A. I would say about four months ago.

Q. What took place at that time?

A. One of the salesgirls we had asked me to talk to the customer, and the customer asked me if we had a store in San Jose, and I told her no. And she said, well, we did have. I told her we didn't have a store there.

(Testimony of Jessie Shelton.)

Q. Where is that salesgirl today, if you know?

A. She is in the store.

Q. What is her name? A. Miss Kelly.

Q. You also have a Mrs. Austin? A. Yes.

Q. Is she in the store today?

A. No, she is out sick today.

Q. Were there any other occasions that have come to your attention of anyone mentioning a Lerner store in San Jose? A. No, sir.

Q. You O.K. checks, do you not?

A. Yes, sir.

Q. I will just ask a leading question to shorten it: You take in a number of checks made out to Lerner's?

Mr. Robinson: We will stipulate—

The Court: I thought we agreed that was the fact.

Mr. Goldberg: I suppose that is true.

Q. These customers who come in from outlying areas, are they people whom you recognize by sight? A. Yes, sir.

Q. Have you any of the same ones who come in repeatedly? [167] A. Quite frequently.

Q. They are regular customers?

A. Yes, sir.

Q. Do people come into the store who have traded in other Lerner stores?

A. From all over the nation.

Q. How frequently does that happen?

A. Every day, I would say.

(Testimony of Jessie Shelton.)

Q. With respect to the type of merchandise that is sold in the Market Street store where you work, do you know what the reputation of that merchandise is with respect to style and price?

Mr. Robinson: Mr. Magee has gone into all that, and, as I have indicated to you, we have nothing against Lerner stores. We think they have a good reputation.

Mr. Goldberg: We admit it is good, but it is the precise reputation that I think we are concerned with.

The Court: Haven't you gone into that with Mr. Magee?

Mr. Goldberg: Speaking of the company generally. I had in mind with respect to this particular store, because it is within her domain a little bit more.

The Court: I suppose counsel will be willing to stipulate that the witness would so testify that it has a good reputation.

Mr. Goldberg: Well, that its reputation is for the latest styles at popular prices.

The Court: Before you know it you are going to have me going in there and buying merchandise.

Mr. Goldberg: I can tell you my wife has. [168]

The Court: That is not an uncommon statement that most good businessmen make in selling merchandise. I do not think you need particularly elaborate on that, Mr. Goldberg. It isn't an element here, is it?

Mr. Goldberg: If the statement I made is ac-

(Testimony of Jessie Shelton.)

cepted as if it were testified to by the witness, I have no objection, because that is what she told me.

The Court: Will you stipulate to that?

Mr. Robinson: So stipulated.

Mr. Goldberg: No further questions.

### Cross Examination

Mr. Robinson: Q. Does your firm do alterations for customers? A. No, sir.

Q. Your firm, of course, does not carry charge or budget accounts? A. No, sir.

Q. Your firm makes no deliveries, is that right?

A. Through the United Parcel.

Q. I mean do you deliver locally in San Francisco? A. Yes, sir.

Q. You make deliveries through the same service that the department stores do? A. Yes, sir.

Q. With regard to sizes, you handle all sizes of merchandise, don't you? A. Yes, sir.

Q. I mean by that over size 20?

A. Well, we handle a few larger sizes. [169]

Q. You do not confine yourself to what is called misses and juniors, do you?

A. We have such a few large sizes.

Q. You do handle large sizes?

A. Yes, sir.

Q. You wouldn't say your business is confined to misses and juniors, as that term is used in the trade?

A. Well, the way we have customers, I wouldn't

(Testimony of Jessie Shelton.)

say we could do very much for the larger-sized woman.

Q. I am asking you what your business is. Is your business confined to misses or juniors? Will you answer Yes or No and explain your answer, if you wish?

A. Well, I would say misses and juniors.

Q. You do handle large sizes, though, don't you?

A. Yes, sir.

Q. So it is not confined to misses and juniors, is it?

A. No, not the way you are putting the question.

Q. You know about the price range in that store, don't you? A. Yes, sir.

Q. And you also know about the highest price line regulation, don't you? A. Yes, sir.

Q. And you know what date that went out of effect?

A. Well, I wouldn't want to say for a fact.

Mr. Robinson: I will state to Mr. Goldberg that Mr. Lerner ascertained by telephone during the noon hour that the date that it was abrogated was as of June 30, 1944.

Mr. Goldberg: I haven't any objection to that, but I do [170] not know that that is determinative of when it became public knowledge that the price line restriction was going out of effect. My understanding is it is based on the statute, and the statute was under consideration for some time before it was finally adopted.

(Testimony of Jessie Shelton.)

Mr. Robinson: It is not based on any statute; it is an OPA regulation.

Mr. Goldberg: It is an OPA regulation obtained on the passage of the statute extending the OPA administration, and that was one of the conditions of its passage, that the price line restriction be eliminated, that the limitation be eliminated.

Mr. Robinson: It went off on June 30. The point is these people——

The Court: Let us not argue about it. If it becomes important you can furnish me with that date.

Mr. Robinson: Are you satisfied to accept that date as the date on which it was abrogated?

Mr. Goldberg: That is the date as of which the statute went into effect.

Mr. Robinson: The highest price line was abrogated, I think, on that day, wasn't it?

Mr. Goldberg: That is my understanding. I mean, it is not determinative of when it became public knowledge.

The Court: Any further questions of this lady?

Mr. Robinson: Q. Can you give me your price ranges as they were prior to the abrogation of the highest price line rule?

A. I don't get your question.

Q. Pardon? A. I don't get your question.

The Court: This lady was not examined about that, and that is a field that has already been covered. Are you going to go over it again?

Mr. Robinson: I expected Mr. Silverman back on that. I thought he would bring the book with him. Have you the book?

(Testimony of Jessie Shelton.)

The Court: This lady doesn't know about prices.

Mr. Goldberg: I have the book right here.

Mr. Robinson: I understand Mr. Silverman would be back with the book.

Mr. Goldberg: You did not ask him to come back; you asked for the book, so I brought the book.

Mr. Robinson: I was not so specific. That is quite right.

The Court: I do not see the materiality of it, and if you pursue this line I am going to hold it is incompetent and irrelevant and shut off examination on that line. I do not see the pertinency of it to this matter.

Hr. Robinson: I might explain the object of this, and then your Honor can dispose of it as your Honor sees fit.

The Court: You have made your point and I have made the ruling. Now let us go on to something else.

Mr. Robinson: That is all. [172]

#### Redirect Examination

Mr. Goldberg: Q. Mrs. Shelton, when the store makes deliveries for a customer, who pays for the cost of delivery? A. The customer.

Q. But if the customer comes in and takes the package under his arm, you do not have any delivery charge? A. No.

Q. Do you know how the prices in Lerner's store on Market Street compare, the same items of merchandise, with prices in other stores in that area?

The Court: Haven't you covered that, Mr. Gold-

(Testimony of Jessie Shelton.)

berg, with the testimony of the manager of the store?

Mr. Goldberg: If it will be stipulated that this witness would testify to the same effect, I wouldn't have any objection to it.

The Court: I do not see that it helps the Court any, because the manager of the store, who presumably is fully acquainted with the policy and business of the store, has testified to it. Now, are you going to bring in every saleslady in the store to corroborate him?

Mr. Goldberg: No.

The Court: Then I do not see any point to it.

Mr. Goldberg: That is all.

The Court: That is all.

---

### MRS. ANN DAVIS

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court, please.      A. Mrs. Ann Davis.

#### Direct Examination

Mr. Goldberg: Q. Mrs. Davis, you are in the employ of the Lerner store on Market Street?

A. Yes, sir.

Q. You have been in the employ of that store for about six years.      A. Yes, sir.

Q. With an interval of a short period when you were out of the store until November of 1944?

(Testimony of Mrs. Ann Davis.)

A. Yes, sir.

Q. You are manager of the dress department?

A. Yes, sir.

Q. Have you had any occasion where any customer mentioned to you the existence of a Larner store in San Jose? A. A couple of times.

Q. Can you tell us about when those were, as well as you can recall, approximately?

A. Well, it was either just a little before Christmas or around Christmas time.

Q. Was that an occasion, or was that one of those occasions that was called to your attention by one of the salesladies?

A. Yes, that was an occasion when I O.K.'d a check. The customer said she was from down around San Jose, and did all her shopping—

Mr. Robinson: I didn't hear that.

The Witness: It was one of the customers, when I was called to O.K. her check—they usually get rather friendly—she said, "Oh, yes, I am from down San Jose," and she usually went down to Lerner's to shop quite frequently.

Mr. Goldberg: Q. Was she the one who mentioned the Lerner store in San Jose, or are you speaking of some other occasion?

A. Well, I couldn't put my finger down on that.

Q. As to whether that was the woman.

A. No.

Q. Who was the saleslady who mentioned that to you? A. That was Miss Austin.

Q. Except for this instance you mentioned, do

(Testimony of Mrs. Ann Davis.)

you know where your customers come from, those that you meet in the store.

A. Well, the come from all over.

Mr. Robinson: I will stipulate that her testimony would be the same.

Mr. Goldberg: As that of Mrs. Shelton?

Mr. Robinson: As that of the previous witness.

Mr. Goldberg: I think if counsel will make that stipulation extend to the balance of Mrs. Shelton's testimony, and ask that apply generally, I will have no further questions.

The Court: Do you want to bring out anything different from what the other witness testified to?

Mr. Goldberg: No.

The Court: He said she would testify the same as the previous witness.

Mr. Goldberg: What I meant was not only with respect to that one question but generally.

The Court: I understood counsel to say he would be willing to stipulate she would testify the same as the other witness who testified. That is, it would cover the same ground.

Mr. Goldberg: That is satisfactory. No further questions.

The Court: Have you any questions of this witness?

Mr. Robinson: No questions.

Mr. Goldberg: I have no further questions.

Mrs. Calder.

The Court: Is this a witness along the same line or something different?

Mr. Goldberg: Yes, her testimony would bear—

Mr. Robinson: Tell us who she is and how long she has been in the store.

The Court: Just state her name.

Mr. Goldberg: Mrs. N. A. Calder. She is in charge of the dress department fitting room in the store in charge of the dress department. She has been with the store since it opened on Market Street. That is the store she works in. She will testify with respect to checks being made out to Lerner's to customers referring to the store as Lerner's, that customers live in Redwood City, San Jose and other Peninsula towns; that would be her testimony.

The Court: Do you stipulate to that?

Mr. Robinson: So stipulated.

Mr. Goldberg: Mrs. Reynolds.

The Court: Is this another witness to the same effect?

Mr. Goldberg: No, with respect to the testimony of this witness—

The Court: Call her.

---

### MRS. BETTY REYNOLDS

called for the plaintiff; sworn.

....

The Clerk: Q. Will you state your name to the Court, please? A. Mrs. Betty Reynolds.

Mr. Goldberg: I will be glad to show to Mr. Robinson a report made by Mrs. Reynolds which

(Testimony of Mrs. Betty Reynolds.)

covers the testimony that I would elicit from her. I will say generally it consists of the result of a survey made by Mrs. Reynolds outside of the Lerner Store on Market Street inquiring of the various people coming in or out or standing by the windows as by the name which they know the store, some of whom volunteer the place they come from and the stores of the company they know in other areas. This was conducted in a period of a couple of hours in the middle of the day, and the witness's testimony, as I understand it, would be the same as her report. So if counsel has no objection to it, I will be glad to read the report. That does not preclude counsel, of course, from cross-examining the witness.

The Court: Is there any objection to the testimony going in in the form of that report?

Mr. Robinson: I will go you even one better. You can read it into the record, or offer it into the record, and I won't ask any questions, and you can excuse Mrs. Reynolds.

The Court: You are excused, madam.

Mr. Goldberg: So that it may be in the record I will read it, if the Court please.

The Court: You might just have it marked in evidence. I will read it and then it will save you the time while you are getting some other witnesses.

(The document was marked Plaintiff's Exhibit 8 and appears in words and figures as follows:)

“Re: Lerner Shops,  
831 Market St.,  
San Francisco, Calif.

The following is the verbatim report of our Mrs. Betty R. Reynolds, covering questioning of customers of the above shop on April 25, 1945 between 11:45 a. m. and 2 p. m.:

‘I contacted women entering, leaving or window shopping at Lerner’s and asked them, ‘Would you mind telling me, when you talk about this store to a friend, what you call it?’

Out of fifty nine (59) women chosen at random, fifty seven (57) spoke of the store as ‘Lerner’s’ two called it ‘Lerner’s Shop’.

One woman stated that the word ‘Lerner’s’ spells good value, popular prices and a nice variety of merchandise. Another woman said that ‘Lerner’s’ was known throughout the United States as ‘Lerner’s’. A woman from Santa Barbara said that she had never known it in any other way than ‘Lerner’s’. A woman from Stockton said that people there just say ‘Lerner’s’ to designate the store and never speak of it by any other name. Two Spanish speaking young girls said they do all their shopping at ‘Lerner’s’.

I asked a man standing outside by what name he knew the store. He said he knew it only as ‘Lerner’s; that he liked his wife to shop there if he was going to meet her after shopping because it was an

(Testimony of Mrs. Betty Reynolds.)

easy name to remember and that his wife had shopped there for years.

Two young school girls, wearing their hair in braids down their backs, always meet at 'Lerner's' after school.

A woman who said she was from New Orleans said that 'Lerner's' have pre-style and are just one month behind New York in their style and material. She said there is a 'Lerner's' in New Orleans.

Another woman from Honolulu said that when women are coming to the mainland, they are advised to shop at Lerner's by other women who have been here before.

Another woman said that she calls it the 'smart shop' and her friends all know that she means 'Lerner's'.

Two Chinese school girls call it 'Lerner's'.

4/25/45"

Mr. Goldberg: I have two other witnesses, store managers, who have not arrived yet, but in view of the way the stipulations have been made it may be that counsel will stipulate to their testimony. The first witness is Mrs. Elert.

Mr. Robinson: What is the difference?

Mr. Goldberg: She is the manager of the Lerner store on Grant Avenue and has been there for quite a long time. She would testify that she has customers from all of the various areas, including San Jose and Peninsula towns as well as larger outlying

areas, and that she has seen checks that have come in as well as return slips, and that customers know the store as Lerner's; that she has had several instances of persons coming in who have referred to the Lerner store in San Jose as being the company's new store, and in the case of one of them, insisted that it was because she could read the sign and she knew it was the Lerner store, although the manager told her it was not. That in substance would be the testimony of Mrs. Elert.

Mr. Robinson: So stipulated.

Mr. Goldberg: The other witness is Miss Kane. She is the manager of the Lerner store in Oakland at Twelfth and Washington Streets. She has been the manager of that store only since about June of 1944, but she managed a store of the company in Pennsylvania for about eight years, is familiar with the fact that she has a lot of customers who come in from outlying areas, including San Jose and the Peninsula towns and, having checked with her money and these exchange slips, she has checks from people who make the checks out to Lerner's, the customers refer to the store as Lerner's, and she has had several instances of customers who have told her about the opening of Lerner's store in San Jose as one of the stores of the company, and she also would testify that she has many people coming into the store who have been customers in other Lerner stores in various parts of the country, the East, the South and the Middlewest.

Mr. Robinson: That would include L. G. Lerner & Company, too, wouldn't it?

Mr. Goldberg: Not to my knowledge.

Mr. Robinson: They are in the Middlewest. How would you know? I will so stipulate. You may have to have my amendment to part of it later.

Mr. Goldberg: She would also testify that one of her means of knowing where her customers are is she takes in deposits on lay-away plan and then she gets the name and address.

My next witness is Mr. Wilfred Lerner.

Mr. Robinson: Is this your last witness?

Mr. Goldberg: I hope.

---

### **WILFRED LERNER,**

called for the plaintiff; sworn.

The Clerk: State your name to the Court, please.

A. Wilfred Lerner.

### **Direct Examination**

By Mr. Goldberg:

Q. You are the defendant in this action, Mr. Lerner? A. I am.

Q. You have a retail store for the sale of women's wearing apparel in San Jose, have you not?

A. Misses' and juniors' wearing apparel is all we handle. We don't handle any women's wearing apparel.

Q. That is at 70 South First Street?

A. That is right.

Q. You opened that store on June 1, 1944?

(Testimony of Wilfred Lerner.)

A. That is right.

Q. You also now reside in San Jose, do you not?

A. That is right.

Q. Prior to June, 1944, you had lived in Palo Alto for eight or nine years?

A. That is right.

Q. Prior to June 1, 1944, you had never been in the retail business anywhere, had you?

A. That is right.

Q. And prior to that date you had never had a place of business in San Jose?

A. That is also right.

Q. Prior to June 1, 1944, you knew of the stores of the plaintiff, did you not?

A. I knew they existed, yes.

Q. You had been in one or more of them, had you not? A. Yes. [182]

Q. You had seen them in New York City?

A. Yes, sir.

Q. And in San Francisco? A. Yes, sir.

Q. In Oakland? A. Yes, sir.

Q. Your store in San Jose—Let me ask you this first: When you opened your store you put a sign across the top carrying the name "Lerner's," did you not? A. That is right.

Q. The picture I hand you is a fair representation of the sign, is it not?

A. The original sign. It is.

Mr. Robinson: Read it in the record, please, what it says.

(Testimony of Wilfred Lerner.)

The Court: Do you wish to offer that in evidence?

Mr. Goldberg: Yes, I am going to offer it in evidence.

The Court: Let it be marked in evidence.

Mr. Goldberg: I assume that your Honor saw it during the pre-trial conference.

(The photograph was marked Plaintiff's Exhibit 9.)

Mr. Goldberg: Q. In addition to the sign with the word "Lerner's" in script across the face of the sign, the word "Apparel" in smaller block letters above "Lerner's" in the right-hand corner, you had the name "Lerner's" on the windows, did you not?

A. That is right.

Q. And the picture I show you of one of the windows is a correct representation of how the name appeared, is it not?

A. It is an exact duplicate of the sign.

Mr. Goldberg: I will offer that in evidence.

(The photograph was marked Plaintiff's Exhibit 10.) [183]

Mr. Robinson: Which one is that?

Mr. Goldberg: The window sign.

Mr. Robinson: I do not know that I have seen that.

Mr. Goldberg: There are two such windows in your store?

The Witness: That is right.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: And the name "Lerner's" was on each of those windows?

The Witness: That is right.

Mr. Robinson: I have never seen those, Mr. Goldberg. These have been touched up, haven't they?

Mr. Goldberg: Not that I know of.

Mr. Robinson: The word "Lerner's" has been obviously touched up.

Mr. Goldberg: I think if you want to testify to that, you might, but I think the statement ought to be withdrawn until you can make such a statement under oath.

Mr. Robinson: That is inked to bring it out. You can see it yourself.

Mr. Goldberg: I can't feel it.

Mr. Robinson: I will object to it unless you bring the photographer here who took the picture to testify that the word "Lerner's" there has not been accentuated by being outlined in ink.

Mr. Goldberg: The witness has identified the picture and it is in evidence, and counsel wants to argue the matter. [184]

Mr. Robinson: Will you ask him, then, if it is a correct representation?

Mr. Goldberg: If your Honor will run a finger over it you will notice there is nothing over it at all, whereas here is one that was inked, which was furnished to us by counsel, and you can tell when you run your finger over the added portion at the top, you can tell it is inked.

(Testimony of Wilfred Lerner.)

The Court: I remember this last photograph you furnished me was one which was produced to show the change that was made.

Mr. Goldberg: That was patently inked, but the picture I have handed to your Honor is not, and if counsel can show on cross-examination or by other witnesses that there is anything wrong with it, I am satisfied; otherwise it is all right.

Mr. Robinson: If it is not, I am very much surprised.

The Court: I do not see that it is of any great importance one way or the other.

Mr. Robinson: I will withdraw it. Mr. Goldberg says it is not inked.

Mr. Goldberg: I have two more that look just like it. I am sure we were not doing any touching up.

Mr. Robinson: The point is when you take those pictures those lines don't show up, and it would be perfectly proper to ink them in if you so desired. I will withdraw that remark. I did not mean to intimate that Mr. Goldberg was touching up pictures. I merely mean if they were inked to bring anything [185] out, that fact should be stated, and it would be perfectly proper to do that, of course. I will show you the reason why I thought it was inked.

The Court: No, I think there is some shadow over a part of it that makes it a different color from the other.

Mr. Robinson: Here is the reason why I thought

(Testimony of Wilfred Lerner.)

it was inked. While it is smaller, at a greater distance you can hardly see it. It is gold letters.

Mr. Goldberg: Look how easily you can see it.

Mr. Robinson: My remarks were based upon my own picture. Now I see undoubtedly there is a black outline on it.

Mr. Goldberg: Q. Mr. Lerner, prior to opening your store in San Jose you ran certain ads in the San Jose newspapers, did you not?

A. You mean when we were getting ready to open?

Q. Prior to the opening.

A. Prior to the opening, yes.

Q. And subsequent to that time?

A. Yes, we are still advertising.

Q. You are familiar with those advertisements which are attached to the complaint in this action?

A. Yes, fairly so. Some of them are about a year old.

Q. You have seen them? A. Yes, I have.

Q. And those are correct representations of the ads that you did run? A. That is right.

Q. In connection with your business you also used sales tags? [186] A. That is right.

Q. Is this a correct representation of the sales tags that you used? A. That is right.

Q. And still use? A. Yes.

Mr. Goldberg: We will offer this in evidence for the form. I don't care about the written material.

(The sales tag was marked Plaintiff's Exhibit 11.)

## PLAINTIFF'S EXHIBIT NO. 11.

No 2 Release  
P. P. O'Brien Exhibit No. 11  
 Filed 4/27/45

C. W. Culbreath, Clerk  
 By R. E. Standard  
 Deputy Clerk

## PLEASE RETAIN THIS CHECK

All purchases should give complete and entire satisfaction in every respect.

This check must accompany purchase for exchange.  
 Merchandise will not be accepted for return or exchange after SIX DAYS from the date of purchase.

*Lerners*

SAN JOSE

70 SOUTH FIRST STREET

RECEIVED - CLERK - SAN JOSE CALIFORNIA

*Lerners*  
 "Youthful Apparel"  
 70 South First Street  
 SAN JOSE, CALIFORNIA  
 Date July 21 1946

Phone Bellard 6307

Name \_\_\_\_\_

Address \_\_\_\_\_  
 PHONE NUMBER 250-19 AMT. REC'D.

*Standard Supply Co.*  
38

Garment Sale	<u>552</u>
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	<u>552</u>
FILLED	<u>17</u>
JUN 7 1946	Alteration
TOTAL <u>567</u>	
Deposit	
CLERK	
BAL. DUE	

CLERK

*S. Seline*



(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. In your business you also use bags in which to contain parcels that you sell?

A. Sweaters and blouses all go in bags.

Q. And on those bags you have a name?

A. That is right.

Q. Is this one of the bags that you used when you opened your business?

A. That is one of the bags we originally used. that is right.

Q. What kind of a bag do you use now?

A. We use the same bag as this, except we have labels that we paste on top of it that says "Wilfred Lerner," the same as the sign outside.

Q. Is that label as large or larger—

A. You have a sample of my box. It is the same cut as the box. I don't know whether you have or not.

Q. No, I have not.

A. It is approximately the "Lerner's"—well, it is the same proportion as the sign, because everything was made from a drawing, blown up or reduced for the cuts, and the "Lerner's" in that is a trifle smaller than it is there, just a fraction, so that it takes approximately the same area. [187]

Mr. Goldberg: I will offer the bag in evidence as Plaintiff's next exhibit.

(The bag was marked Plaintiff's Exhibit 12.)

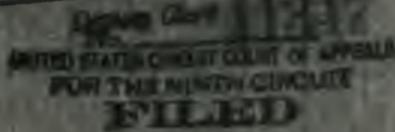


From Alfred Jor  
San Jose

No 23-62-G  
P1's Exhibit No. 12  
Filed 4/27/45

C. W. Calbreath, Clerk

By P. E. Woodward



JUN - 7 1946

PAUL P. O'BRIEN,  
CLERK

Lerner's

70 S. FIRST ST., SAN JOSE



(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. When was it that you started to put a sticker over the name "Lerner's" on your bags?

A. Well, just as soon as we could get the stickers from the printers we started using them, both on the bags and on the boxes. We started that shortly after we got into litigation. We didn't want any litigation. We tried to—

Q. You can answer my question.

The Court: It has already been answered. He said, "shortly after the litigation started."

The Witness: The exact date I couldn't tell you.

Mr. Goldberg: Q. The complaint was filed in September, was it, in September?

A. The complaint was filed in September? No, it was before that, I believe, because my recollection is it was some time in July when we first started becoming involved with your business.

Q. That is right.

A. It was shortly after we ordered the sign changed, the new cuts made. The exact dates I couldn't give you. As quickly as I could get the cuts made and the labels printed we started using them.

Q. You said you ordered the sign changed. Are you speaking of the sign at the top of the store?

The Court: Is there any dispute about this? When was [188] this done? Was this a result of the pre-trial conference?

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Part of it was the result of pre-trial, and part of it—

The Court: It had taken place before?

Mr. Robinson: It had taken place before—just a moment, I am not sure of that. I think at the pre-trial, yes, it had already been ordered. I can't be sure about that.

The Court: If you can't help on that we will let the witness testify.

Mr. Goldberg: Q. You were still using the tag with the name "Lerner's" on it, the sales tag, when this was made out on August 30th?

A. What are you referring to? I didn't get your question.

Q. The sales tag with the name "Lerner."

A. The sales tag?

Q. Yes.

A. The sales tag took four to six months to get printed. We are still using them today.

Q. These stickers that you were talking about, on which you put the name "Wilfred," did you use those also on your mailing envelopes and boxes?

A. No, not these stickers.

Q. I will ask you if this is an envelope that you sent out to your counsel?

A. This is a sticker that was only used for mailing. This is not the sticker I referred to that went on the bag. This does not go on those bags. That is not the sticker I refer to on the bags. The other sticker is about that—well, say three by six or three and a half by six [189] inches, maybe even larger.

(Testimony of Wilfred Lerner.)

Q. This sticker with the name "Lerner's" only, the original one, you were still using on October 13, 1944, were you not?

Mr. Robinson: To whom was that addressed?

Mr. Goldberg: To you.

Mr. Robinson: Henry Robinson?

Mr. Goldberg: That is right.

Mr. Robinson: I am not a customer of his store or yours. I do not wear useful feminine apparel.

Mr. Goldberg: Q. Is that correct?

A. That was used on that package, yes.

Mr. Goldberg: I will offer this in evidence as plaintiff's next exhibit.

(The sticker was marked Plaintiff's Exhibit 13 in evidence.)







(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. Can you tell us when it was that you changed the sign at the top of the entrance for your store?

A. Which change?

Q. Well, what changes did you make?

A. Well, we immediately upon hearing from you, your first letter—

Mr. Robinson: That letter was dated, Mr. Goldberg, the letter of Mr. Steinhart was dated July 12th, I believe, so we might as well give the witness that date so he can tie the incident to it, if you have no objection.

Mr. Goldberg: I have no objection.

The Witness: Immediately upon hearing from Mr. Steinhart— [190] I don't want to mention the date, because I am not sure of it—

Mr. Robinson: I think it was July 12th, wasn't it?

Mr. Goldberg: That is the date of the letter. The 12th or the 13th.

The Witness: Well, we got it a couple of days later. I ordered the sign man to make an addition to our large sign outside, "Home Owned." We put signs in the window and signs in the store. There was a sign in the window that read something to the effect that this was a home owned store, not connected with any other store. There was a sign inside the store that read, "This is a home-owned store." Later we made additional changes in the sign.

Q. When was the change made?

(Testimony of Wilfred Lerner.)

A. Well, when they had the pre-trial conference—I think Mr. Ladar and Mr. Robinson—we added the name, "Wilfred" to the sign on top. That was ordered some time in the latter part of last year but didn't get finished until this year.

Q. It did not get finished until about two or three weeks ago, did it?

A. That is right. That is no fault of mine. The sign man couldn't get it done any sooner.

Q. Is this a correct representation of that sign?

A. As it is today, yes.

Q. As it appears today?

A. And the change was made also on the glass.

The Court: Are these offered in evidence, Mr. Goldberg? [191]

Mr. Goldberg: Yes, I want to offer that in evidence.

(Photograph was marked Plaintiff's Exhibit 14 in evidence.)

The Witness: The gold leaf change on the glass was made considerably sooner than the sign up above, because that only entailed one man, where the other brought into being two or three companies that were involved in changing the upper sign.

Mr. Goldberg: Q. When would you say the change on the windows was made?

A. I believe it was the latter part of last year. The exact date I wouldn't attempt to say.

Q. Is this a correct representation of that lettering as changed? A. That is right.

(Testimony of Wilfred Lerner.)

(Photograph was marked Plaintiff's Exhibit 15 in evidence.)

Mr. Goldberg: Q. Now, I will show you five additional photographs and ask you if in each of those the sign as it now appears on your store appears in the picture? A. Yes.

Mr. Robinson: Was the photographer lying flat on his back when he took them?

Mr. Goldberg: He took them, or so I assume, in various positions, in which anyone approaching the store on the street would see it.

The Court: How many pictures are there?

Mr. Goldberg: Five.

The Court: Do you wish to offer them as one exhibit?

Mr. Goldberg: Well, I think it would probably be better if they were offered separately. I do not know that we will refer [192] to any of them specifically, but I think it would be better if they were numbered separately.

(Photographs were marked Plaintiff's Exhibits 16-A to 16-E, inclusive, in evidence.)

Mr. Goldberg: Q. I will ask you if this picture is a correct representation of the floor between your windows entering your store as it exists?

A. Yes, that is a picture of the entranceway.

Q. As it exists today? A. That is right.

Mr. Goldberg: We offer that in evidence and ask that it be marked Plaintiff's next exhibit.

(Photograph was marked Plaintiff's Exhibit 17 in evidence.)

(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. Did you make any change in your advertisements, as to how your name appeared on them?

A. I did. I think if you will refer to the scrapbook Mr. Robinson has, you can get the dates from that.

Q. That was approximately in November, 1944?

A. I couldn't state the date. Everything is stated in there.

Q. I mention it, because I recall it on your last deposition.

The Witness: I believe they are all in order, the dates following.

Mr. Robinson: The words "Home owned" first appear in an ad of August 18, 1944, and then "Home owned" appears consistently thereafter. The word "Wilfred" appears for the first time Sunday, November 26, 1944, and appears thereafter. [193]

Mr. Goldberg: And the elimination of the apostrophe "s" on "Lerner's" appears for the first time December 3, 1944.

Mr. Robinson: That is right, the very next day. November 26th had the apostrophe "s" and then December 3rd the apostrophe apparently was cut right out of the same cut.

The Witness: That is exactly what happened.

Mr. Goldberg: Q. On all your ads until Sunday, January 28th, you also, in addition to your name, first as "Lerner's," and then as "Wilfred Lerner," had a little cut with the words "The Shop With You In Mind?"

(Testimony of Wilfred Lerner.)

A. That is right. Do you want that explained?

Q. If you think it needs explanation, that is satisfactory.

Mr. Robinson: Will you explain, Mr. Lerner, while I am looking at that?

The Court: Let counsel finish his direct examination first.

Mr. Goldberg: Q. I will show you a tear sheet dated April 22, 1945, from the San Jose "Mercury-Herald and News," which I believe was the last issue in which you inserted an ad, is that correct?

A. Last Sunday was the ad I had—was that last Sunday's paper, April 22nd?

The Court: April 22nd was last Sunday.

The Witness: Yes, that was the last one.

Mr. Goldberg: Q. And this is a correct copy of your ad that day, is it not?

A. That is right.

Mr. Goldberg: I will offer that in evidence as Plaintiff's [194] next exhibit.

(Tear sheet referred to marked Plaintiff's Exhibit 18 in evidence.)



PLAINTIFF'S EXHIBIT NO.18.

# Hits from the Easter Parade

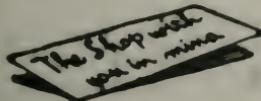
*Short Coats  
Tunic Coats  
Mandarin  
Coats*

100% VIRGIN WOOL

Gold — Belga — Blue — Aqua —  
Lime—American Beauty\$29<sup>95</sup>

*Trim  
Tailored  
Suits  
from  
\$25<sup>00</sup>*

for your convenience  
Budget Terms  
at no extra cost



*Wiffred*  
**Lerner**  
TO S. FIRST ST. SAN JOSE  
HOME OWNED



No. 1347

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
FILED

JUN - 1 1946

PAUL P. O'BRIEN,

CLERK

Navy or green rayon  
crepe with flower  
motif. Sizes A12 to  
A20.

No. 23662-C

P/l/s. Exhibit No. 18

Filed 4/27/45

C. W. Calbreath, Clerk

By F. E. Devereux  
Deputy Clerk



(Testimony of Wilfred Lerner.)

Mr. Goldberg: Q. Mr. Lerner, can you tell us what items of merchandise you handle in your store?

A. Yes. Coats, suits, dresses, sweaters, blouses, slacks, slack suits, jackets and skirts.

Q. Do you have hosiery? A. No.

Q. Underwear? A. No.

Q. Girdles? A. No lingerie.

Q. None of the so-called small wears?

A. No purses, no hats.

Q. Can you give us your price range, that is, the low and the high prices of those items?

A. Well, they vary from time to time. Right now they are approximately, in coats, from \$25 to approximately \$129.95. All of those prices, of course, on the fur-trimmed goods, have tax extra. That would mean 20 per cent higher than the price I quoted you on the tax.

Q. That is on coats that are fur-trimmed?

A. Coats that are fur-trimmed. On suits we have suits from \$25 to \$49.95. On dresses, from \$8—no, we just got in some at prices from \$7.95 to \$20.95. Our normal price on dresses is \$8.95 to \$20.95. Sometimes we have a few higher.

On jackets, they run from \$9.95 to, I believe, \$12.50 or \$12.95. I don't know exactly which price it is there. It is \$12.50 or \$12.95. [195]

Skirts are from \$6.95 to, I think, around \$9.95. I wouldn't want to state exactly on the top price. But nothing lower than \$6.95.

Sweaters starting at \$4.95 to \$8.95, I believe. What have I left out?

(Testimony of Wilfred Lerner.)

Q. Have you given me the slack suits?

A. Slack suits from \$8.95 to \$19.95. Separate slacks from \$5.95 to, I believe it is, \$9.95. Did I give you blouses?

Q. I don't think you did.

A. Blouses from \$2.95 to \$6.95.

Q. When you say that you now sell coats from \$25 up to your top range, do you have a separate range for untrimmed coats, do you know?

A. When I said \$25, that is your untrimmed coats.

Q. What is the top range on your untrimmed coats? A. I think at present \$39.95.

Q. And then on the fur-trimmed coats, what is your range?

A. \$55 is the lowest cost we have on fur-trimmed coats.

Q. The fact is— A. That means plus tax.

Q. The fact is, however, is it not, that on a number of occasions since you have opened your store you have advertised untrimmed coats at \$19.95, have you not?

A. We have had coats at different prices, yes. We have reduced coats and advertised them for \$19.95.

Q. Haven't you had coats at the regular price of \$19.95? A. Not a reduction, no.

Q. In those ads you did not state it was a reduction, did you? [196]

A. It is not necessary to.

(Testimony of Wilfred Lerner.)

Q. You have advertised new coats at \$19.95, haven't you? A. They weren't second hand.

Mr. Robinson: Will you show me what ads you are referring to?

Mr. Goldberg: I am trying to simplify it.

Q. I do not find your ad on coats. Now, what about suits, on which you say your range is from \$25 to \$49.95? A. That is right.

Q. You do sell suits also at \$19.95, do you not?

A. We have suits that have been reduced that we do sell at \$19.95.

Q. Haven't you frequently advertised new suits at \$19.95?

A. That is right, we sometimes make reductions when merchandise first comes in.

Q. I call your attention to an ad in your scrap book dated August 4, 1944, reading, "New suits, 100 per cent virgin wool, \$19.95 to \$45," and at the top of the ad are "Plan now for fall." That is one of your ads, isn't it?

A. That is right.

Q. Were you reducing fall suits in August?

A. That is right. It is possible. I don't know in that particular case. The one you are referring to, \$19.95, undoubtedly was, so it might have been some merchandise—I have had merchandise sent to me that was not ordered, and we do not like to return anything in these days because it is hard to get. Sometimes it is below our standards and we reduce it the minute it comes in. [197]

Q. On Sunday, August 13, 1944, you advertised

(Testimony of Wilfred Lerner.)

as follows: "Plan now for fall. New fall suits \$19.95 to \$45." That is correct, isn't it?

A. Yes, that is correct.

Q. Was that also a reduced price?

A. No, it is most likely the same suits. It is a reduced price, yes, but most likely the same suits.

Mr. Robinson: The same ad?

Mr. Goldberg: No, it is not the same ad. It is nine days later.

The Witness: I think I still have some down there. I haven't got rid of them all yet.

Mr. Goldberg: Q. On Sunday, October 4, 1944, under an ad entitled, "Headquarters for suits, Cardigans, Classics, Dressmakers, 100 per cent virgin wool, suits that suit, \$19.95 to \$45." That was your ad, wasn't it?

A. Yes, sir. I just got through telling you I have those same suits. I have been in business eleven months and we still have some of them left. So my psychology in reducing them in the beginning was right. We haven't cleared them out yet. There was about a dozen pieces altogether.

Q. So these suits you advertised in October as Cardigans, Classics and Dressmakers are the same as the suits you advertised back in August as the new fall suits? A. The \$19.95 suits, yes.

Q. On November 12, 1944 — [198]

Mr. Robinson: Mr. Goldberg, I do not know what your object is. I just took a look at Mr. Silverman's testimony, and according to him suits begin at \$6.95. So it would not make any difference

(Testimony of Wilfred Lerner.)

whether he began at \$19.95. The principle would still be the same. He is in the higher price range than you, the general proposition.

Mr. Goldberg: Are we to argue that?

The Court: I do not see what prices have to do with the issues.

Mr. Goldberg: I think it means this: Our suits run about the prices testified, and we say these people sell merchandise within the same price range as ours.

The Court: Let us grant that they do. What difference does it make?

Mr. Goldberg: Then it proves we are trying to sell the same merchandise at the same price.

The Court: So perhaps are hundreds or thousands of other people. I do not see the relevancy of it.

Mr. Goldberg: I think this is true, isn't it? If they sold something that we never sold or never attempted to sell, it could well be argued there was no competition. This is a part of our case to prove that there is competition.

Mr. Robinson: We will stipulate to that.

The Court: I think you gentlemen have this situation: You would hardly say a man selling \$16.95 dresses in Seattle was [199] in competition with a man selling the same priced dresses in Los Angeles. The mere fact that the dresses are in the same price range does not mean there is competition.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: That is perfectly true. I am not asking to introduce this evidence to prove our case, but to prove one part of our case.

Mr. Robinson: Are you willing to make this stipulation, which we found to be the fact from your taking of Mr. Lerner's deposition, that we overlap unquestionably, but our top lines are higher than your top lines, and your bottom lines are down lower than our bottom lines; we overlap in the middle.

Mr. Goldberg: There is no question about that. That is correct.

The Court: Will that cover what you are getting at?

Mr. Goldberg: Well, as far as this witness' testimony is concerned, I think he is departing from the facts as shown by his own records in that he is making the bottom of his price line on suits and coats higher than it actually is, and the higher it is, the less there might be competition, and the lower it is, the more competition.

Mr. Robinson: He told you he had a dozen items at that price.

Mr. Goldberg: I am coming to more than that.

The Court: What you are trying to prove by this witness is that while the price range is different, you think this [200] witness is exaggerating his price range, is that it?

Mr. Goldberg: I think he is exaggerating the difference between our price range and his. In other words, by his testimony he is pulling in a lit-

(Testimony of Wilfred Lerner.)

tle bit further away from the middle, you might say.

The Court: You are trying to bring out now that this witness is exaggerating his price range?

Mr. Goldberg: That is right.

Mr. Robinson: I might also point out, your Honor, there has been no testimony here as to what Lerner's price range was in June of 1944, when Mr. Lerner opened his store. As to that there is absolutely no evidence. They are giving us testimony as of today only that Mr. Silverman knew, he admitted the prices were lower. So until we have something with which to compare—

Mr. Goldberg: We have the base period book here and it shows those ceilings.

Mr. Robinson: You mean the ones that I tried to get from Mr. Silverman?

Mr. Goldberg: Not that you tried to get. You asked about it. You asked for the book and we offered the book.

Mr. Robinson: Have you your highest price range here?

Mr. Goldberg: Yes.

Mr. Robinson: Will you read those in?

Mr. Goldberg: May I finish with the scrapbook first?

The Court: I hope you gentlemen will not take too long [201] at it, because it does not seem to me to have a great deal of bearing on the matter.

Mr. Goldberg: Q. Mr. Lerner, isn't it a fact that in addition to all the ads I have already called

(Testimony of Wilfred Lerner.)

to your attention, that again on November 26th, on December 3rd and on December 10th you were advertising suits at \$19.95?

A. That is right, and we still have some of those same suits in the store today. I will bring you right up to date—the same suits.

Q. Isn't it also a fact that you were advertising, and on many occasions, fur-trimmed coats at \$49.95?

A. I believe he will find one ad in there at \$45 plus tax.

Q. Will you answer my question?

A. Yes, sir.

Q. The answer to my question is yes, is it not?

A. That is right.

Mr. Robinson: Just a moment. We have the book there.

Mr. Goldberg: I am trying to shorten it at his Honor's request.

Mr. Robinson: You went through it on the deposition. You had no difficulty. "Many" is a variable term.

Mr. Goldberg: I guess I can't please counsel and try to expedite this thing.

Mr. Robinson: If they are in that book they are our ads. There is no doubt about it.

Mr. Goldberg: I refer to the ad, "New Luxurious Fur Coats \$49.95 to \$110 plus tax," on August 4, 1944. Again on September [202] 15, 1944, "Your new fall coats should have full luxurious furs, fine fabrics, masterfully executed, \$49 to \$110."

(Testimony of Wilfred Lerner.)

Mr. Robinson: I think it would help the court if you would prepare a schedule.

The Court: I am not going to need any schedule.

Mr. Goldberg: Again on October 22, 1944, again on November 5, 1944—these are the ads of fur trimmed coats at \$49.95—again on December 10, 1944.

Mr. Robinson: All right. I will stipulate his low price range was \$49.95. Your price is \$24.95. So what is the difference? \$49.95 is so far from \$24.95.

Mr. Goldberg: At counsel's request we have brought in here a book of the plaintiff entitled, "Base period prices for this store," and the second sheet has the following under "Maximum Price Regulation 330."

The Court: What store is this?

Mr. Goldberg: This is the Market Street store. That is the one of which Mr. Silverman is the manager, and he sent this in. You will recall counsel asked for the Base Period Book.

The Court: What do I need that for?

Mr. Goldberg: Counsel wanted us to verify the top prices, the highest prices as they existed prior—

The Court: You mean in the San Francisco store of the plaintiff?

Mr. Goldberg: In the San Francisco store at the time the [203] defendant's store was opened. Now, this is labeled, "OPA Price Limitations,

(Testimony of Wilfred Lerner.)

spring selling season, March 1, to July 31," and has the following commodities and prices—

Mr. Robinson: It is 1944?

Mr. Goldberg: Yes.

Mr. Robinson: It refers to 1944?

Mr. Goldberg: I will be glad to read it or have the reporter copy it into the record.

The Court: It is up to you gentlemen, which ever way you want it in, if you think it is important.

Mr. Robinson: If Mr. Goldberg will just read it into the record, I believe that will be satisfactory.

Mr. Goldberg: These are our highest prices: Coats, \$59.95. Suits, \$39.95. Women's dresses, \$10.95. Misses' dresses, \$29.95. Jackets, \$7.98. Skirts, \$6.98. Blouses, \$4.98. Slacks, \$6.98. Slack suits, \$10.98. Fur coats, \$49.95. Fur jackets, \$49.95.

Q. Mr. Lerner, what is the size of your store in San Jose?

A. Well, the frontage on the sidewalk is approximately 16 feet. After you are approximately 10 feet inside the door it becomes 20 feet wide. There is jog out from the store next door.

Q. About how deep is it?

A. 110, I believe.

Q. How many people do you employ in your store?

A. There are six besides my wife and myself in the store.

Q. You and your wife work in the store?

(Testimony of Wilfred Lerner.)

A. Well, we are there. We only supervise except when everybody else is busy, and then [204] we actually make sales. Outside of that we do not.

Q. The six employees are sales people?

A. No, we have four sales girls and two in the alteration room.

Q. These newspapers that you advertise in San Jose are also sold on the street in other communities, are they not?

A. I couldn't answer that.

Q. Haven't you seen them for sale in Palo Alto? A. No, never.

Mr. Goldberg: Are you in a position, Mr. Robinson, to stipulate that the San Jose papers are on sale in Palo Alto? I can prove it but I thought it was such—

Mr. Robinson: I do not know about that, but I haven't the slightest doubt that the San Jose paper probably would be found on the newsstands in Palo Alto. I will stipulate—

The Witness: I don't argue that, either. You asked me if I had seen them. I have never seen them. I lived there almost nine years.

Mr. Robinson: I will stipulate that they are. It is common sense that they would be. But I won't go with you as far as San Mateo, Burlingame, or San Francisco, and that includes Fourth and Market.

Mr. Goldberg: Q. Mr. Lerner, you have customers that come from Palo Alto?

(Testimony of Wilfred Lerner.)

A. I believe we have.

Q. You have quite a few, have you not?

A. We have some, yes.

Q. Do you recall that in your wife's deposition she said about 50 people from Palo Alto had come into your store? [205]

A. Well, I wouldn't attempt to make any count of them.

Mr. Robinson: She also said they were personal friends, Mr. Goldberg.

Mr. Goldberg: She said of those she knew. There might have been others from Palo Alto whom she did not know, but of those she knew.

Mr. Robinson: Then her testimony is there may have been others, but she knew she had fifty personal friends. If you want to state her testimony that is what she said.

Mr. Goldberg: I wouldn't state it in that way—

The Court: Please let us get on. What is the next question of the witness?

Mr. Goldberg: Q. You have customers who come from other peninsular areas that you know of? A. Yes.

Q. Where?

A. We have customers from Campbell, Los Gatos, Los Altos, and some in Redwood City.

Q. Santa Clara? A. Santa Clara, yes.

Q. Mountain View? A. Mountain View.

Q. Sunnyvale? A. Sunnyvale.

Mr. Goldberg: That is all.

(Testimony of Wilfred Lerner.)

The Court: Do you want to ask any questions?

Mr. Robinson: Just about one question while we have him here at this time.

### Cross-Examination

Mr. Robinson: Q. Mr. Goldberg asked you about that cut, [206] "The shop with you in mind." Where did you get that?

A. Well, when I was first opening the store I contacted the newspaper down there and I got together with the gentleman who handles our advertising—that is, our district—and with him we planned our first ads. He brought me in cuts and borders to use—in fact, all the cuts seen in those ads, with the exception of one, which was sent out by a company in the East, were furnished by the newspaper. And then he brought me in a set of borders, and that is when we got what Mr. Goldberg referred to, a little cut that had a box stating, "The shop with you in mind." He suggested it as a good slogan to use for the store. That we have followed through ever since. We use two newspaper services, Meyer Both and Metro, which are circulated in every city of any consequence in the United States.

Q. By "service," you mean they give you the wording and language of the ads and you just fill in your prices and put in your name cut?

A. That is right.

Q. This "The shop with you in mind" you never used except in the ads and in the form of the cut?

(Testimony of Wilfred Lerner.)

A. Just the way it is situated in the sheet.

Q. I hand you a paper that states at the bottom, "Meyer Both General Newspaper Service," dated May 4th, and ask you to explain to the Court what that is.

A. This is a page from one of their monthly issues that they send out. It has different cuts, different ads made up, borders, and also usually it contains [207] on other pages the cuts which we use in our advertising of different garments. It also goes into other fields from hardware stores to newspaper work, or any other type of advertising where cuts are used.

Q. Is this the sample that was submitted to you for that cut?

A. That was one of the pages.

Q. "The shop with you in mind?"

A. That is right.

Q. That is the cut at the bottom?

A. That is the exact cut we are using.

Q. That is the cut that appears in your ads at various places where space permits?

A. That is right.

Mr. Robinson: That is all. [208]

Redirect Examination

Mr. Goldberg: Q. You do not know of any other store in San Jose, or which advertises in the San Jose paper, that uses that cut, do you.

A. No. At that time—

The Court: You have answered the question. You do not know.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: There is one question that I wanted to ask Mr. Lerner.

Q. Since you have opened your store you have had people come in who have asked you whether or not you were related to the Lerner store in San Francisco?

A. We have had people come in that upon hearing my name was Lerner asked me if I was related to the people who had the store in San Francisco, yes.

Q. And that has happened once or twice a month?

A. Well, approximately—at the outside. I wouldn't say consistently once or twice a month, but at the outside once or twice a month.

Q. But you do get those questions occasionally?

A. Occasionally.

Q. But you do not know whether the people asking those questions bought merchandise from you or not?

A. No. I wouldn't want to state whether they did or they did not.

Mr. Goldberg: That is all.

The Court: That is all.

Mr. Robinson: Of course, we will reserve our right to [209] examine further the defendant. Is that your case?

Mr. Goldberg: Plaintiff rests.

The Court: We will take a five-minute recess at this time.

(Recess.)

Mr. Goldberg: If the Court please, there are two minor items I think should be clarified. I was not certain in what shape we left the testimony of Mrs. Reynolds, whose report was admitted in evidence as Plaintiff's Exhibit No. 8. What I had in mind doing, what I thought I was doing was, we were stipulating that if Mrs. Reynolds testified she would testify in accordance with this report, then have the report copied into the transcript of the testimony as her testimony.

The Court: That is my understanding.

Mr. Robinson: That is my understanding. I would like to have a copy if you happen to have an extra one.

Mr. Goldberg: I will prepare one for you. I have a copy, and the reporter will copy Exhibit 8 into the record.

The Court: It is an exhibit. I do not think it has to be copied.

Mr. Goldberg: I think purely as a matter of convenience, if it is at the place where she is sworn, it might be simpler.

In connection with the testimony of Mr. Magee on a matter that the Court thinks is probably irrelevant, but in any event I think there is a slight misapprehension—there is in [210] my mind—on this firm that was known as Lerner's or Lerner-Vogue, it is my understanding—and I have confirmed it with Mr. Magee—that after the settlement with that company was made, the name of certain of the stores was changed to J. S. Lerner-Vogue,

and the names of the other stores were changed to some altogether different name not having "Lerner" in it. But I think this morning there was some confusion as to whether the name presently used by that company was Lerner-Vogue or J. S. Lerner-Vogue, and it is my understanding it is merely J. S. Lerner-Vogue; is that correct, Mr. Magee? May his testimony be clarified to that extent, or at least amended?

The Court: Is that agreeable?

Mr. Robinson: So stipulated. Is that your case?

Mr. Goldberg: Yes.

Mr. Robinson: Let the record show, then, a motion for a nonsuit.

The Court: We call it a motion to dismiss.

Mr. Robinson: Or a motion to dismiss.

The Court: In the Federal Court.

Mr. Robinson: If your Honor wishes to withhold a ruling on that until we offer a very slight amount of evidence——

The Court: Counsel, I do not know that it is necessary to offer any evidence. I am going to call on counsel for the plaintiff to point out any of the equities that they think are in the case. I do not think there is any need to add to [211] the record in the case.

Mr. Robinson: I do not think of anything. I do not know if there is a picture of our present store in evidence.

Mr. Goldberg: Yes, there is.

Mr. Robinson: I mean a full view.

The Court: That is Plaintiff's Exhibit 9.

Mr. Robinson: We have some evidence to this effect, your Honor, which your Honor may or may not wish in, undisputed evidence as to where he was born, when he got married, how many years he has been living in Palo Alto.

The Court: The plaintiff has not made any point on that.

Mr. Robinson: His activities down there, all going to the question of good faith. There is no evidence here except the use of the name with which the defendant is charged, and I have observed that your Honor has indicated a desire to limit the issues, and for that reason only I am withholding any further evidence, unless your Honor thinks it would be of some assistance to the Court.

The Court: I have heard this case argued, don't you remember, at a pre-trial conference, too, as well as here, and the picture is the same: There is an elaboration of some of these matters, but the general overall issue that is submitted is the same as argued at the pre-trial conference.

Mr. Robinson: The only thing that occurs to me is this: As it stands now, the only thing upon which it appears to me [212] any complaint can be based is the manner, the place and the time at which the name was used. It might fortify Mr. Lerner's position to some extent.

The Court: If you wish to submit the matter at this time—

Mr. Robinson: I will take maybe ten minutes.

The Court: I am only suggesting this, counsel, because I do not see any real disputable issues of fact involved in the case.

Mr. Robinson: I will run over this rather rapidly.

---

### WILFRED LERNER

recalled in his own behalf; previously sworn.

#### Direct Examination

Mr. Robinson: Q. Mr. Lerner, what is your age? A. Thirty-nine.

Q. How long have you been married?

A. Seventeen years.

Q. You have one child, have you not?

A. That is right.

Q. You were born in San Francisco?

A. San Francisco, January 3, 1906.

Q. You went in business with your father some years ago, did you not? A. I did.

Q. When?

A. In 1926. I was first connected with him and became a special partner in 1942.

Q. But you were connected with your father since sometime in the twenties? A. Yes.

Q. What kind of business was that?

A. The manufacturing of ladies' coats, suits, and sometimes dresses.

(Testimony of Wilfred Lerner.)

Q. In the course of that business you had dealings with the retail outlets? A. That is right.

Q. Did you travel around and make calls on the outlets? A. I did occasionally.

Q. Among the places you traveled was San Jose one of them? A. That is right.

Q. Did you travel up and down the Peninsula and other places?

A. My most regular stops were from San Jose to San Francisco and Oakland.

Q. You lived in San Francisco during part of this time, did you not?

A. Until approximately nine years ago.

Q. That would be nine years from now, or nine years before you opened your store?

A. Well, nine years from now—about ten years ago, about 1935.

Q. About 1935. And where did you move to then? A. Palo Alto.

Q. Did you live continuously in Palo Alto until the time you opened your store in San Jose?

A. Until approximately eleven days after we opened the store.

Q. What is the reason for the fact that your store was opened first and then you subsequently moved to San Jose?

A. Because we couldn't find a place to live in San Jose. It took us over four months to find a place.

Q. When did you first make up your mind to

(Testimony of Wilfred Lerner.)

go into the ladies' [214] ready-to-wear retail business?      A. Back in 1931 or 1932.

Q. And during that time did you look for opportunities and locations?

A. At different periods during that time I did.

Q. When did San Jose first come to your attention, attract your attention as a place for opening the store?

A. Approximately 1938 or 1939.

Q. And what did you do at that time?

A. Well, there was a shop down there by the name of the Hollywood Shop. It was owned by a father-in-law of a very good friend of mine, and I attempted to purchase it when he was selling it, I believe it was in 1939, but it was sold to someone else before I could make any complete arrangements on it.

Q. At all the times that you had intended to go into business, under what name did you intend to go into business?

A. There never was any question that I was going to use my own name, Lerner's.

Q. Under what name were you in business with your father?      A. L. G. Lerner.

Q. That was the name of that firm of which you later became a partner?

A. That is right.

Q. While you resided in Palo Alto did you and your family, you and your wife, become widely acquainted on the Peninsula.      A. We did.

Q. That included San Jose?

(Testimony of Wilfred Lerner.)

A. Yes, sir. Our acquaintances on the Peninsula ranged from—well, you might say all [215] the way from San Jose to San Francisco, because we still knew people in San Francisco, and the Peninsula as a whole is grouped together in different organizations.

Q. Do you and your wife belong to Peninsula organizations? A. We do.

Q. By "grouped together" what do you mean?

A. Well, they don't have different lodges or chapters in each community. One will suffice for the entire Peninsula in most cases.

Q. In other words, if you belong to an organization it would embrace both Palo Alto and San Jose? A. In most cases.

Q. Can you name some of the organizations to which you or your wife belonged?

A. Well, I wasn't too active down there. I belonged to the B'Nai B'Rith, which was the only organization that I had joined down there, but my wife was both member and officer in B'Nai B'Rith, Hadassah, Council of Jewish Women, American Red Cross—she was quite active in, held a titled job—I don't recall the name of the exact job.

Q. What did she call herself in her deposition, do you remember? I think she was director or president, something like that.

A. Parent Teachers Association—in fact, practically all or a good percentage of all the organizations.

Q. In the course of your wife's activities did

(Testimony of Wilfred Lerner.)

you have occasion to accompany her, meet with and mingle with the people in those organizations?

A. Oh, yes, many occasion.

Q. Even though you yourself were not a member? [216]      A. That is right.

Q. They being mostly ladies' organizations?

A. They all have evenings when they try to raise money.

Q. Did you make any other efforts to get a retail store in San Jose?

A. Yes, for the past three years I have had someone looking in San Jose for me for a store.

Q. Did you get to the point of actually looking at locations?      A. Oh, yes, several times.

Q. Did you ever get to the point of actually discussing rents and terms either directly or through an intermediary?

A. Well, I had a friend of mine who was in business in San Jose who was really my scout and who looked after the different vacancies as they came about for me, and would inform me of them, find out the rentals, who owned them, who offered them for lease. And after he would get that information I would go down and look over the store. As a matter of fact, the store I am in now he made all arrangements for me up to and including the point of an appointment with the owner of a building.

Q. Prior to that time you or he for you had negotiated for locations that you did not take?

A. That is right.

(Testimony of Wilfred Lerner.)

Q. Do you recall some of those?

A. Well, there is Hale Brothers had a store offered across the street from where their store is now that they had their appliance shop in. That was offered as a sub-lease. In that block below there were two stores that were offered to me. Then the Hollywood Shop—we [217] approached to buy the Hollywood Shop about a year and a half ago when one of the brothers of the family, who was the manager of the store, was drafted. We tried to buy that store. Incidentally, that store is on the same block, about four or five doors of where I am now located.

Q. When did you make a lease in San Jose?

A. Either February or March. I don't know—I believe it was the latter part of February in 1944.

Q. And then you immediately started making arrangements to open up?

A. That is right.

Q. And you did open up; correct?

A. That is right.

Mr. Robinson: Mr. Goldberg, have you offered in evidence any ads in addition to those which are attached to the complaint?

Mr. Goldberg: We offered the last one that the defendant has inserted in the paper, the one of April 22, 1945.

The Witness: That is not in the book, Mr. Robinson. That was last Sunday's ad.

Mr. Robinson: I see. Could I see that and see

(Testimony of Wilfred Lerner.)

if that is a fair enough exemplar of all of them as they now are?

Q. Does that have the word "Home Owned"?

A. Should have.

Q. I do not suppose there is any need of putting in more ads. They are merely variations of the same setup. Your name has been Wilfred from birth, I suppose, to get that into the record?

A. That is right. [218]

Mr. Robinson: I think that is all.

Mr. Goldberg: Q. It is Wilfred A. Lerner, Wilfred Alexander Lerner? A. That is right.

Mr. Robinson: I might ask him one question. You will probably elicit it anyway.

Q. How did you happen to choose the particular script, design, that was used for your sign? Is that a clear type, or is it a specially made design?

A. I had a commercial artist—I don't recall his name; I believe it was a Chinaman on Post Street upstairs from Liebes' where he has his work room or office. I went to him and I wrote my name out in the manner in which I signed my name, and I said to him, "Make me a drawing using this type of script." From that drawing all our goods and signs have been made. It is as close a replica of my own signature as you can make and have legible.

Q. Was that the same man who later added the "Wilfred"?

A. No, he was a commercial artist. The other

(Testimony of Wilfred Lerner.)

man who added in the other was the sign man in San Jose.

Q. You used that as a basis?

A. I used that as a basis. The original card is the one that has been blown up and all these cuts and everything else has been made up, and the sign man in San Jose had the "Wilfred" added.

Q. And your literature and your signs—I mean the main part of it is based on this first cut?

A. With the exception of the sales tags which were printed before cuts were [219] available, all the other printing is in that.

Q. Tell us about those sales tags. Those tags are what customers get when they make a purchase, is that right? A. That is right.

Q. I do not know whether you explained to Mr. Goldberg whether you were able to obtain others with your cut.

The Court: He said it took six months to get them.

Mr. Robinson: Q. You have ordered them, have you not? A. Yes.

Q. Do you intend to use them when you get them? A. I presume so.

Q. Now, Mr. Lerner, you have charge accounts and budget accounts? A. We do.

Q. You make deliveries free, without charge to the customers?

A. We do, any place the law allows us to.

Q. Any place the ODT allows you?

(Testimony of Wilfred Lerner.)

A. That is right.

Q. Do you make alterations?

A. We do. We charge for most alterations, however.

Mr. Robinson: By the time we are through we will have your Honor going to San Jose to buy.

The Court: I think you are covering ground that has been covered already. Mr. Goldberg brought out some of this. I may be in error about this. I heard it some place or other.

Mr. Robinson: I brought out from one of the ladies that Lerner's in San Francisco did not make alterations, did not [220] make deliveries, did not have—

The Court: Is there any other point you want to bring out?

Mr. Robinson: Q. Generally speaking, Mr. Lerner, your price lines are higher than those of the plaintiff, of Lerner stores in San Francisco or elsewhere, so far as you know?

A. That is right.

Q. That is, your lowest price would generally be higher than their lowest price, and your highest price would be higher than their highest price?

A. That is right.

Mr. Robinson: That is all.

#### Cross-Examination

Mr. Goldberg: Q. Your sales, however, are generally made somewhere between the highest and the lowest prices of a particular article, are they not?

A. Well, every sale is not made at the highest

(Testimony of Wilfred Lerner.)

price, if that is what you are trying to get at. We sell merchandise at all the various prices.

Q. Including the lowest prices? A. Yes.

Q. You referred to this business of your and your father having manufactured dresses. That had not occurred for four or five years prior to the opening of the store, had it?

A. That is right.

Q. Your father's business is no longer in existence, is it? A. That is right.

Q. What is the rate of mark-up or gross profit that you figure [221] in your business?

A. Our average gross mark-up is around 42 per cent.

Q. That is, your average gross profit on the sale is 42 per cent? A. That is right.

Q. In other words, if you sell at a dollar, your gross profit is an average of 42 cents?

A. That is right.

Mr. Goldberg: I think that is all.

#### Redirect Examination

Mr. Robinson: Q. In this matter of prices, Mr. Lerner, when you opened, you recall the OPA regulation that a newly opened store that was not in business during the base period fixed its prices by the prices of its competitor nearest to itself?

A. That is right.

Q. What is the competitor that does the nearest type of business to Lerner's store in San Jose?

A. Grayson's.

Q. Grayson's? A. That is right.

(Testimony of Wilfred Lerner.)

Q. Zukor's down there?

A. Zukor's also.

Q. You heard the testimony of these gentlemen here that Lerner's even undersells those two?

A. That is right.

Q. When you fixed your OPA ceilings who was your nearest competitor?

A. The OPA granted us the right to use Blum's, a specialty shop, one of the finest specialty shops in San Jose, as our nearest competitor.

Q. And that is your price range?

A. That is our price range. [222]

Q. As a matter of fact, your OPA price list is Blum's price list, is that right?

A. That is correct.

Mr. Robinson: Mr. Goldberg has stipulated I might read into the record the March 1944 highest price line, which corresponds to the list that he read in.

The Court: Very well.

Mr. Robinson: Women's coats \$149; Misses' coats, \$149; Women's suits, \$59.95; Misses' suits, \$59.95; Jackets, \$10.95; Skirts, \$12.98; Misses' — misses' and women's are duplicates all the way through—Dresses, \$89.95; Blouses, \$9.95; Sweaters, \$10.95; Slacks, \$6.98.

Mr. Goldberg: There seems to be some mistake. Those prices do not jibe at all with the testimony the witness gave.

(Testimony of Wilfred Lerner.)

The Witness: We are entering Blum's ceiling prices as granted by the OPA. That is what we have to keep on record.

Mr. Goldberg: Q. That is your actual top price?

A. In some cases no; in some cases our top prices today are higher than those, because we have been allowed by the OPA a change since June 30.

Mr. Robinson: I am giving the prices that are comparable to your March 1944 prices. Your witness Silverman gave the later prices.

Mr. Goldberg: I think we are getting into some confusion here.

Mr. Robinson: There is only one more figure. Let us get it in.

Mr. Goldberg: The witness testified to his price range, the lowest and the highest prices for particular items, and if what counsel is reading is intended to be a deviation from that or a change in it, then I would like to understand so I can cross-examine the witness. I would like to understand what this list is.

Mr. Robinson: There is only one more figure, then I will explain it. Women's slack suits, \$19.88. The reason for the two prices, the fall price line and the spring price line, the fall price line is higher than the spring price line.

Mr. Goldberg: The one you read is very much higher than the one the witness testified to. The witness testified to a top price of \$29.95, and you read a price of \$89.95.

(Testimony of Wilfred Lerner.)

The Witness: Pardon me, Mr. Goldberg. This is Blum's ceiling prices that the OPA granted us. The price of \$29.95, as I told you, was a price we have today in the store at present. In other words—

Mr. Goldberg: In other words, the \$89.95 has no relation to your actual business.

The Witness: Yes, it has in this respect, that the OPA granted us the right that we were of the class of store that could carry that.

Mr. Goldberg: Q. But you do not?

A. I do not happen to have it today, because I can't get it today. I might have it tomorrow.

Q. You never have had?

A. He have had higher priced merchandise, but I have not given you any incidental sales. We have sold a fur coat for \$475 plus tax, but I haven't even quoted that in the testimony, because it was one occasion.

Q. It isn't your regular line of business?

A. That is right.

Q. And \$89 prices are not your regular line of business?

A. If we could get them today we would have them consistently, because we have a class of trade that would pay for furs.

Q. But you have never sold one up to now?

A. No.

The Court: Haven't we covered this?

Mr. Robinson: One question.

Q. Do you know Weinstein's in San Francisco?

A. Yes. During my lunch hour I went over and

(Testimony of Wilfred Lerner.)

visited Mr. Blum, who is the buyer there, and ascertained their average mark-up is 33 1/3 percent, and he will confirm that if you wish him to.

Q. Mr. Lerner, on your disposition I believe you classified the plaintiff, Lerner store, as low end?

A. I did.

Q. By "low end" you mean the stores that sell at the cheapest prices? A. That is right.

Q. Whatever the terminology is, they are the lowest? A. That is right.

Q. And you are not? A. That is right.

Q. And you have no intention of being?

A. No, sir.

Mr. Robinson: That is all.

Mr. Goldberg: Q. Is it your testimony that no one else sells at lower prices than Lerner's, the plaintiff.

A. No, I do not know throughout the United States, because I believe in New York Klein's might undersell you. But I do state that in the classifications your type of merchandise is known as low end merchandise.

Q. Would that apply to merchandise that we sell at the same price that we do?

A. The same price?

Q. We have dresses at the same price that you do, do we not? A. That is right.

Q. Would those also be called low end?

A. That is your top price merchandise, but that is not your average. Our average percentage sales

(Testimony of Wilfred Lerner.)

of our \$8.95 dresses won't run two percent of our business.

Q. You also sell \$7.95 dresses?

A. Yes, sir, occasionally.

Mr. Goldberg: That is all.

The Court: Is the evidence completed now?

Mr. Robinson: Just one thing. I will at least offer it. I forgot to have Mr. Lerner identify it. You gentlemen know it, however. It is the photograph which I showed to Mr. Magee to see if he could identify it. It is a photograph of a store in San Francisco, 1025 Market Street, exactly two blocks from the Lerner shop. It is on Market Street. I will offer that in evidence as a defendant's exhibit to show there is a store using block letters "Lerner Hat Shop," and that Lerner's also handle hats.

Mr. Goldberg: I will object to the offer, if the Court please, on the ground it is not a fair representation of the actual print which meets the eye of anybody who sees it. I went out and looked at it myself, and I think it is a very unfair representation.

Mr. Robinson: I do not know that it is much different from the one you took looking up from the base of a lamp post.

Mr. Goldberg: We showed at least what a person would see from that direction. If your Honor will look at it—

The Court: I will allow it in subject to your objection.

Mr. Robinson: I will correct the objection if you will only wait a minute.

(Testimony of Wilfred Lerner.)

Mr. Goldberg: That is a small part of the store.

Mr. Robinson: It shows more than any of your pictures show of our store, so it can't be unfair, and it is not taken by a man lying on his back as yours were.

Mr. Goldberg: I think you ought to withdraw that. You have no foundation for it, and it is not true.

Mr. Robinson: Except the angle of the shot.

Mr. Goldberg: I wish you would testify to those things instead of making a statement you do not know anything about.

The Court: Is this the same one?

Mr. Goldberg: I do not think it is a fair representation. However I think it is immaterial.

The Court: I will allow it in evidence subject to your objection.

(The photograph was marked Defendant's Exhibit C.)

The Court: Does that conclude the evidence?

Mr. Robinson: That is the case, your Honor.

The Court: I would like to hear from counsel for the plaintiff, as I said before, on this matter. I have been unable to see any equities in this case.

(Argument.)

The Court: The judgment will go for the defendant with costs, and you may submit findings as provided in the rules.

[Endorsed]: Filed May 28, 1946.